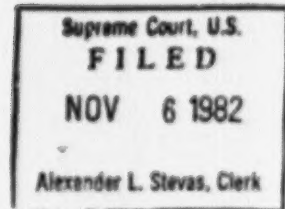
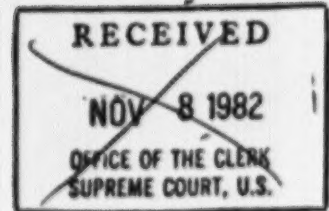


No. 82-5698

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982



HUGH W. MELSON, Petitioner

vs

STATE OF TENNESSEE

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

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QUESTIONS PRESENTED

- I. Whether the evidence presented at trial was sufficient to convict the Petitioner of murder in the first degree beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment.
- II. Whether the Petitioner's Eighth Amendment rights were violated by the fixing of excessive bail.
- III. Whether the Petitioner's rights to a fair and impartial trial as guaranteed by the Sixth Amendment to the United States Constitution, and to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution were violated.
- IV. Whether the Petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth Amendment right to due process were violated by admission of certain photographs of the victim.
- V. Whether the Petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth Amendment right to due process were violated by admission of evidence of various types of testing.
- VI. The Petitioner's right to an impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution was violated by imposition of a "Death Qualified" jury and by excusal for cause of all who opposed the death penalty.
- VII. Whether the Petitioner's Sixth Amendment rights to effective assistance of counsel and his Fourteenth Amendment right to due process were violated by the refusal of the Trial Court to grant a continuance of the trial.

VIII. Whether the Petitioner's Fourth Amendment right was violated by his arrest made without probable cause.

IX. Whether the Petitioner's Fourth Amendment right was violated through seizure of Petitioner's property obtained after the illegal arrest of the Petitioner.

X. Whether the Petitioner's Fourth Amendment right was violated because of a search conducted by authority of an invalid search warrant.

XI. Whether the Petitioner's Fourth Amendment right was violated through seizure of Petitioner's property by authority of an invalid search warrant.

XII. Whether the Tennessee Death Penalty Act is unconstitutional because it violates the Eighth and Fourteenth Amendments to the Constitution of the United States.

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OPINION BELOW

The opinion below of the Supreme Court of Tennessee appears in the Appendix as A-1 and is reported as State v. Melson, 638 S.W.2d 342 (Tenn. 1982). The Order on Petition to Rehear was filed September 7, 1982, and appears in the Appendix as A-2.

JURISDICTION

The judgment and opinion of the Supreme Court of Tennessee was filed August 16, 1982. A Petition to Rehear was denied on September 7, 1982. This Petition for Writ of Certiorari is filed within the time allowed by this Court. This Court's jurisdiction is invoked under 28 U.S.C. §1257 and 28 U.S.C. §2101.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following amendments are set forth in the Appendix:
U.S. Const. Amend. IV, VI, VIII and XIV.

The following statutes are set forth in the Appendix:
T.C.A. §§ 2404 and 2406.

STATEMENT OF THE CASE

Reference to the Statement of the Evidence (transcript of the proceedings) will be designated by the abbreviation "S.E." Reference to the technical record will be designated by the abbreviation "T." Reference to Exhibits will be designated by the abbreviation "E."

The Petitioner, HUGH W. MELSON, was arrested on April 10, 1980 at approximately 4:00 p.m. (S.E. 668). The arrest occurred within one hour of the discovery of the body of the wife of the Petitioner's employer (S.E. 558-560), who had last been seen alive earlier that same afternoon (S.E. 849-851).

The Petitioner was indicted on May 5, 1980 (T. 2-5), by the Madison County, Tennessee Grand Jury.

On May 12, 1980, the Petitioner filed a motion to set bail (T. 6-7) and at a subsequent hearing on May 16, 1980, bail was set at \$200,000.00. On September 26, 1980, the Petitioner filed a motion to reduce bail (T. 74-75), which was denied. On May 23, 1980, the Petitioner filed a motion for change of venue with supporting documentation (T. 8-10),

which was denied. On September 3, 1980, the Petitioner filed a motion for the release of tangible evidence to him for testing (T. 60-61), which was granted. A motion to suppress evidence obtained in the course of the Petitioner's arrest and during the search of his vehicle was filed on September 26, 1980, and was denied. Also on September 26, 1980, Petitioner filed a motion to prevent disqualification of jurors based on their views of capital punishment (challenging "death qualification" on voir dire) (T. 67-68), and a motion challenging the constitutionality of the Tennessee statute providing for imposition of the death penalty (T. 71-72); both were denied. On September 29, 1980, a motion to suppress certain photographs of the victim was filed (T. 81-82), which was denied. On October 6, 1980, a motion to allow the Petitioner to participate in his defense at trial (T. 87-88), and a motion for continuance (T. 83-83C) were filed, both of which were denied.

The trial of the cause was held October 14-17, 1980. The jury found the Petitioner guilty of first degree murder and fixed his punishment at death after a bifurcated hearing (T. 123-124). The jury unanimously found the following statutory aggravating circumstances:

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

The Petitioner perfected his appeal to the Tennessee Supreme Court in a timely manner. The Supreme Court affirmed the conviction on August 16, 1982. See State v. Melson, 638 S.W.2d 342 (Tenn. 1982), and A-1 of the Appendix. All questions raised before this Court were presented to the Tennessee Supreme Court for review.

A recitation of the facts will not be presented here, but such facts as may be relevant will be set forth as necessary in the substantive argument which follows.

ARGUMENT

- I. WHETHER THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVICT THE PETITIONER OF MURDER IN THE FIRST DEGREE BEYOND A REASONABLE DOUBT AS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The theory of the State in this case is that the Petitioner and the victim, who was the wife of the Petitioner's employer, argued over the logging of ten gallons of gasoline in a log book. Kimba Lawrence, the victim's daughter-in-law, testified that the victim told Ms. Lawrence that she (the victim) was upset and wanted to stay at the house (S.E. 562). This was at 9:00 a.m. on the day of the murder. The Petitioner had been at the house earlier as he had been instructed by his employer (S.E. 887). Mattie Lewis, the maid, had overheard what she thought to be an argument between the Petitioner and the victim concerning some gasoline (S.E. 840-841).

As an employee on the farm, for over twenty-two years, the Petitioner had gasoline privileges. However, because of thefts of gasoline, the Lawrences had moved the pump's switch and had begun to log the use of the gasoline (S.E. 888-889). On the morning of April 10, 1980, Mr. Lawrence had told everybody that the gasoline would be logged (S.E. 888).

The Petitioner was driving the "farm truck", that belonged to Dick Lawrence, a son of the employer, during the morning (S.E. 862-908).

Of the witnesses who testified, the last one to see the victim alive was Mattie Lewis, who testified that at 1:35 p.m., the victim took the witness to the witness' car which was parked elsewhere on the farm (S.E. 850). [The witness was probably confused about the time and meant 2:35 since the witness was still locked out of the house at 1:30 p.m. (S.E. 844.) After the witness had left in her car, she saw the Petitioner in the Petitioner's truck following her away from the Lawrence residence and noticed that someone else was in the truck (S.E. 851). This corresponds with the testimony of Henry Shanklin (another employee) and Mary Jones (a local store owner) concerning the Petitioner's trip to Jones Package Store (S.E. 971, 996-998). The following is an estimation of the Petitioner's location on April 10, 1980:

1:00 p.m.	arrived at Henry Shanklin's house (S.E. 955-958)
2:30-2:45 p.m.	left Henry Shanklin's house and arrived at Jones Package Store (S.E. 967-968, 971, 998)
2:45-3:00 p.m.	Petitioner separated from Henry Shanklin (S.E. 972)
3:00 p.m.	Petitioner was inside Henry Shanklin's house, drinking his beer when Jenny and Dora Ingram and Phyllis Tyson returned to Shanklin's house

(S.E. 668)
4:00-4:10 p.m. Petitioner arrested at Henry Shanklin's house (S.E. 668)

The Assistant County Medical Examiner, Dr. George Shannon, told Lt. James Jowers that the time of death was approximately 2:00 p.m. This information was related by Dr. Shannon on the night of April 10, 1980, or early the next morning of April 11, 1980. Further, Lt. Jowers testified that Dr. Shannon had never mentioned the time of 3:00 p.m. (S.E. 1150-1151). The Affidavit of Complaint filed in the Court of General Sessions for Madison County stated that Dr. Shannon estimated the time of death at 2:00 p.m. (T. 1a). Also, the Jackson Sun, in its April 13, 1980, edition stated: "Dr. George Shannon, Assistant County Medical Examiner, estimated Mrs. Lawrence died about 2:00 p.m. as a result of head injuries..." quoting the above-reference affidavit (Exhibit to Change Venue). However, at trial, Dr. Shannon stated that the time of death was 3:00 p.m. and that he never told anyone any other time (S.E. 939-940). This was not the only major inconsistency in the testimony.

At trial, Mattie Lewis greatly embellished upon her testimony given at preliminary hearing and the hearing on the motion to suppress evidence. Her testimony at trial was also much expanded in comparison to the statement she gave to the sheriff's office (Cf. S.E. 841 and S.E. 16; and S.E. 846 and S.E. 17-18, S.E. 865-867). When questioned about the differences in her testimony at trial and the statement she gave the sheriff's office, she stated, "I didn't want to talk about it," (S.E. 863).

While Mr. Lawrence testified that the Petitioner "had problems" with other employees (S.E. 886), all of the other witnesses who were asked responded that the Petitioner got along with everyone (S.E. 562, 951, 958).

Certainly the testimony of Kimba Lawrence that Barbara Lawrence, the victim, was "upset" that morning and didn't want to leave the house (S.E. 948-949) did not prove that the victim feared any violent action on the part of the Petitioner. The victim related that she didn't want to leave the house and then asked Kimba Lawrence to make a long drive to put two visitors on a highway (S.E. 949). Then,

the victim left the house later that morning to go out to lunch at 11:00 a.m. (S.E. 566), and then drove around town until 1:00 p.m. (S.E. 566). These are certainly not the actions of a woman who was afraid to leave her home. Also, Kimba Lawrence admitted that the victim didn't want to leave her house because the victim was afraid something would "come up missing" (S.E. 952). The victim did not indicate that she was in fear of bodily harm (S.E. 952). Further, Kimba Lawrence testified that the victim related "very little" about being upset during lunch (S.E. 566).

Further, the Petitioner questions the presence of a shirt not belonging to him (S.E. 1170) in his truck, which had human blood on it (S.E. 904, E. 30). His truck was apparently left unattended from the time of his arrest [4:10 p.m.] until it was towed to the police garage at 7:51 p.m. (S.E. 703). None of the items taken from the Petitioner's truck were checked for fingerprints (S.E. 758).

There was no blood or human tissue found in the Petitioner's fingernail scrappings (S.E. 794-795).

The testing which was performed at the FBI laboratory was inconclusive and speculative. Agent Richard D. Watson testified that he examined the Petitioner's clothing, a wrench, and a hammer. He performed tests that revealed a small amount of human blood, but did not have a sufficient quantity of blood to "type" it, the witness could not have testified that it was the victim's blood because "that is an impossibility, in the science" (S.E. 794). Agent Michael P. Malone testified that he made several hair comparisons of hair found on the hammer (S.E. 822) and hair found on the victim's blouse (S.E. 818). While he said the hair from the hammer was "indistinguishable" from the victim's hairs, and that the hair found on the victim's blouse "matched" the Petitioner's hair sample (S.E. 819), he testified on cross-examination that hair comparisons "do not constitute a basis for positive personal identification (S.E. 831) as the FBI report stated. There was absolutely no evidence that any of these test results could prove any of the conclusions which were being stated in that regard.

The testimony of H.L. MacDonnell was based upon microscopic examination in a field of science not previously recognized in Tennessee

(S.E. 1105) and of which he appears to be one of the few experts, if not the only expert, in this field (S.E. 1101).

The Petitioner contends that the evidence was insufficient to sustain a verdict of guilty on first degree murder. There was not proof beyond a reasonable doubt to any rational trier of fact. Jackson v. Virginia, 443 U.S. 307 (1979). Therefore, the conviction of the Petitioner for first degree murder with the resulting sentence of death by electrocution was a violation of the Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

II. WHETHER THE PETITIONER'S EIGHTH AMENDMENT RIGHTS WERE VIOLATED BY THE FIXING OF EXCESSIVE BAIL.

On May 12, 1980, the Petitioner filed a motion to set bail in his case (T. 6-7). A hearing was had on the motion on May 16, 1980. The Trial Court fixed the Petitioner's bond at \$200,000.00.

On September 26, 1980, the Petitioner filed a motion to reduce the \$200,000.00 bond previously set by the Court (T. 74-75). A hearing was had on October 3, 1980, at which time the Trial Court declined to reduce the amount as previously fixed.

It is the Petitioner's contention that the fixing of bail at \$200,000.00, and the subsequent denial of the motion to reduce bail, constitutes "excessive bail." This Supreme Court of the United States has construed the "excessive bail" clause of the Eighth Amendment to the circumstances of each individual defendant, in an amount no greater than is necessary to assure the defendant's appearance. Bandy v. United States, 364 U.S. 477 (1960); Stack v. Boyle, 342 U.S. 1 (1951).

The guarantee against excessive bail is fundamental. To set bail in an amount which assures that the defendant cannot be released is a violation of his right to bail as guaranteed by the United States Constitution.

III. WHETHER THE PETITIONER'S RIGHTS TO A FAIR AND IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED.

The Petitioner was indicted on May 5, 1980, (T. 2-4). On May 23, 1980, the Petitioner filed a motion for change of venue (T. 8). In

support of the motion, the Petitioner filed a collective exhibit marked "A", which included copies of newspaper articles, and information regarding radio and television coverage. The Petitioner submitted one hundred and seventy (170) affidavits collected from attorneys (Exhibit "B"), Madison County residents (Exhibit "C") and from residents of surrounding counties (Exhibit "D"). The affidavits support the Petitioner's contention that a fair and impartial trial could not be had in Madison County or the surrounding counties due to widespread publicity received by the case.

On May 30, 1980, the Trial Court conducted a hearing on the motion, they denied the Petitioner's request (T. 51).

The voir dire lasted approximately one and one-half days (S.E. vol. 1-4). The Petitioner used all of the peremptory challenges allotted to him by statute (S.E. 510). During the examination of the prospective jurors, it was discovered that almost without exception, all had either heard about the murder on radio or television, or had read the accounts in one or more of the newspapers (S.E. 41, 163, 268, 324, 426, 491).

Of the twelve jurors and one alternate juror who served on the case, only one person, Bobby J. Pruitt, had not been exposed to the pre-trial publicity (S.E. 511). In addition, Jimmy Barnes had overheard discussions at work concerning the case (S.E. 72). Flewellen Jenkins knew one of the victim's family members (who was in the courtroom) (S.E. 461) and Mrs. Grady Clements had attended college with the victim (S.E. 47). This panel cannot be viewed as fair and impartial by any standard. The Petitioner was powerless to further challenge the panel, having used all of his peremptory challenges.

The Petitioner asserts that he has proven that a change of venue should have been granted and that the failure to do so has deprived him of life and liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution, and has deprived him of his right to a fair and impartial trial in contravention of the Sixth Amendment to the United States Constitution. See, Rideau v. Louisiana, 373 U.S. 732 (1963); Irvin v. Dowd, 366 U.S. 717 (1961).

IV. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY ADMISSION OF CERTAIN PHOTOGRAPHS OF THE VICTIM.

The Petitioner objected to the introduction of photographs (S.E. 602 and Defendant's Motion to Suppress Use of Photographs at T. 81-82) because there was no dispute over this fact of the victim's death, and due to the gruesome nature of the photographs, their probative value and relevance were outweighed by their prejudicial effect. Therefore, the admission of said photographs violated the Petitioner's Fourteenth and Sixth Amendment rights.

V. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY ADMISSION OF EVIDENCE OF VARIOUS TYPES OF TESTING.

By a motion in limine to suppress certain evidence (T. 81), the Petitioner objected to the State's use of either reports or personnel from the Federal Bureau of Investigation concerning chemical analysis of clothing and items taken from the Petitioner. The Petitioner asserts that the results of the Federal Bureau of Investigation analysis are so speculative and indefinite as to be without probative value. Certain blood and hair samples were examined by the Federal Bureau of Investigation but the report from said agency reveals that "it is pointed out that hair comparisons do not constitute the basis for positive personal identification." (S.E. 831) Blood samples were only identified as human blood within certain broad blood groupings. No positive blood type identification could be made. (S.E. 771) It is the Petitioner's contention that the results of the blood examinations were so indefinite as to be inconclusive insofar as the Petitioner was concerned.

The Petitioner objected to the testimony of Herbert L. MacDonnell, who placed before the jury his theories concerning blood spatter patterns, in that he was not an expert in any recognized science in the State of Tennessee (S.E. 1105). Further, his evaluation was based upon speculation (S.E. 1092-1094).

The questions raised before this Court were directly considered in United States v. Brady, 595 F.2d 359 (6th Cir. 1979) [hereinafter cited as Brady]. Using the four-prong test established in United States v. Brown, 557 F.2d 541 (6th Cir. 1977) [hereinafter cited as Brown], the

Court considered expert testimony, permitted by the trial Court, based upon hair comparisons conducted through the use of an optical microscope. The Petitioner contends that three of the four "prongs" have not been met by the State in the testimony concerning the blood samples and the testimony concerning the hair comparisons, and that none of the "prongs" have been met concerning "blood spatter." The nature and the results of the testing performed by both witnesses were so speculative as to have no probative value, but great prejudicial effect. Therefore, the Petitioner's Fourteenth and Sixth Amendment rights under the United States Constitution were violated.

VI. THE PETITIONER'S RIGHT TO AN IMPARTIAL JURY UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY IMPOSITION OF A "DEATH QUALIFIED" JURY AND BY EXCUSAL FOR CAUSE OF ALL WHO OPPOSED THE DEATH PENALTY.

The following prospective jurors were excused for cause, based upon their view that they could not impose the death penalty: Clara Young (S.E. 140-142); Myrtle Monroe (S.E. 218-221); Frances Adams was excused even though she said, "I guess I might consider it." (S.E. 276); Harry Knight (S.E. 326); Robert Price (S.E. 377); Thomas Bullock was excused because he said he could not impose the death penalty in this case (S.E. 518); and Lawrence Lanier (S.E. 520).

However, a challenge for cause of Mr. W. T. Woods, who stated that he would impose the death penalty because of the nature of the crime (T. 225), was overruled (T. 228-229).

The exclusion for cause of venire members opposed to capital punishment violates the exacting standards of the Sixth Amendment. As the Court stated in Witherspoon v. Illinois, 391 U.S. 510, 519 A. 15 (1968): "one of the most important functions any jury can perform ... is to maintain a link between contemporary community values and the penal system." For this reason, the systematic exclusion of death-scrupled jurors for cause produces a wholly different practical effect, and presents a wholly different legal question, than exclusions for cause upon other commonly recognized grounds. With this excision, the Petitioner's Sixth Amendment interest in a jury impartial drawn from a cross-section of the community is seriously impaired. Cf. Witherspoon, supra, at 513-514; Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1977).

An essential ingredient of any death-sentencing procedure is the jury's ability to " 'maintain a link between contemporary community values and the penal system'." Woodson v. North Carolina, 428 U.S. 280, 295 (1976). This ingredient is required by the Eighth Amendment. Juries selected by the systematic exclusion of every venire member who will not impose a death sentence cannot possibly perform the vital constitutional function assigned to capital jurors by the Court's decisions in Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976). Accordingly, death-qualifying a jury substantially impairs a defendant's Eighth Amendment right to a jury reflecting contemporary community values on the issue of punishment. Petitioner asserts that any form of death qualification of the jury at a capital trial violates the Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and that under the facts of this case, his rights have been violated.

VII. WHETHER THE PETITIONER'S SIXTH AMENDMENT RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY THE REFUSAL OF THE TRIAL COURT TO GRANT A CONTINUANCE OF THE TRIAL.

The first reason this case should have been continued was to allow the defense more time to prepare to rebut the testimony of witness Herbert MacDonnell, presented as an expert witness by the State. It was incumbent upon the trial Court to allow the defense time to find an expert witness who can acquaint the defense with the matters of which the State's witness will testify, and to assist the defense in preparing their cross-examination of this "expert" witness.

Ms. Judith Bunker, the defense's intended witness on blood patterns, was not mailed the tangible, physical evidence until September 9, 1980. For approximately five months prior to the mailing of the evidence to Ms. Bunker, this material was in the custody of the prosecution and was in various stages of examination by their expert witnesses. Ms. Bunker, the defense's proposed witness, had less than 28 days to receive, examine, report on and mail back to the prosecution the tangible, physical evidence. Ms. Bunker resides in Florida and conducts her business there and by the very nature of her work, she was one of the few people qualified in the area of blood spatter and thus has a large backlog of work to be

done. (See Petitioner's counsel's affidavit to their Motion for Continuance and the letter of Ms. Judith Bunker of Orlando, Florida, subsequently submitted thereto). (T. 83-83C)

The second reason that the Trial Court should have granted a continuance is because as of October 6, 1980, defense counsel had not received a report of the psychiatric testing performed on behalf of the prosecution at the Middle Tennessee Mental Health Institute.

The third reason that a continuance should have been granted is because defense counsel only became aware of the assistance which could be offered by the Southern Poverty Law Center on October 2, 1980. Before this time, the availability of these resources was unknown to the defense. Defense counsel would submit, as this Court is well aware, that expertise in a specialized field can be of tremendous value in preparing a defense. Since Petitioner was in custody, the State would suffer no injury from a continuance, but Petitioner would have gained immense help in the preparation of his defense had the continuance been granted. Therefore, failure to grant a continuance, which would have been no detriment to the State, but of great benefit to the Petitioner, constitutes abuse of discretion. This is especially true in light of the higher standard of due process that is required in a capital case. Gardner v. Florida, 430 U.S. 349 (1977).

The defense was hampered in three separate, distinct and important areas described above in the preparation of their defense of this action, and thus were unable to adequately and sufficiently prepare for trial. Therefore, the Petitioner's Sixth and Fourteenth Amendment rights were violated.

VIII. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED BY HIS ARREST MADE WITHOUT PROBABLE CAUSE.

By motion filed on September 26, 1980, the Petitioner moved the Court to suppress any and all items which were seized as a result of the illegal arrest of the Petitioner on April 10, 1980. (T. 65-66).

The hearing on the Petitioner's motion to suppress was held on October 13, 1980 (S.E. 6 et. seq.) and was concluded during the trial after the arrival of an out-of-state witness (S.E. 945 et. seq.). Gene Martindale, a photographer with the Jackson Sun testified that he took

pictures relating to the case on April 10, 1980, the date the Petitioner was arrested. Two photographs of the Petitioner being brought to the Courthouse on that date were produced by the witness (S.E. 7). The photograph which appeared in the newspaper and an enlargement of the same picture were admitted into evidence (S.E. 10).

These photographs clearly showed that blood was not noticeable on the Petitioner's clothing at the time of his arrest. This fact is confirmed by the testimony of arresting officer David Woolfork, who testified that he did not notice any blood on the Petitioner's clothing until after the Petitioner had been handcuffed, placed in the car, and taken to the Lawrence house (S.E. 678-683). Officer William F. Page testified that he did not notice any blood at first on the Petitioner, but did notice some after Officer Page got into the car with the Petitioner (S.E. 641-643). Therefore, the Petitioner was not arrested because of any blood on his clothing.

There can be no question that the Petitioner was arrested at the house of Henry Shanklin. The Petitioner was taken into custody, handcuffed and placed into the patrol car for transportation to the Lawrence home (S.E. 678-679). At that time, all the officers knew was that the Petitioner had an argument with the victim that morning (S.E. 948). There was no history of violence between the Petitioner and the victim--the Petitioner had never threatened or struck any of the Lawrence family members (S.E. 951). The officers came into contact with the Petitioner, who was on the Lawrence farm approximately one-fourth (1/4) mile from the house where the victim was found (S.E. 667). The Petitioner came out of that house willingly (S.E. 681) and did not attempt to flee or resist in any way (S.E. 681).

The Trial Court recognized that "this has created some problem and probably is a close question," in ruling that there had been probable cause for the arrest (S.E. 954). The Petitioner submits that the question of whether there was probable cause for a warrantless arrest is not even close. The constitutional protection against such arrest was written into the Constitution of the United States to guard against just this type of intrusion upon the citizenry. The Sixth Circuit Court of Appeals has stated that "[p]robable cause means 'more than bare

suspicion.' It means 'reasonable ground for belief of guilt,'" citing Brinegar v. United States, 338 U.S. 160, 175 (1949). United States v. Lewis, 504 F.2d 92 (6th Cir. 1974).

Based upon these facts, there was no probable cause for arrest without a warrant. Therefore, the Petitioner's right under the Fourth Amendment was violated.

IX. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED THROUGH SEIZURE OF PETITIONER'S PROPERTY OBTAINED AFTER THE ILLEGAL ARREST OF THE PETITIONER.

The Petitioner was arrested at approximately 4:10 p.m. (S.E. 668). He was transported to the jail and at 4:35 p.m. the officers removed the Petitioner's shirt, pants, cap and boots (S.E. 673-674). The Petitioner asserts that since his arrest was invalid, the subsequent seizure of all property from him was also invalid.

There is no question that the protection of the Fourth Amendment to the United States Constitution has been extended in the States through the protections of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961).

After an illegal arrest has occurred, nothing that happens thereafter can make the arrest lawful, or justify a search of its incident. Rios v. United States, 364 U.S. 253 (1960). Therefore, all evidence obtained as a result of the arrest in this case was inadmissible, and should have been suppressed. Wong Sun v U.S., 371 U.S. 471 (1963); Henry v. United States, 361 U.S. 98 (1959).

X. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED BECAUSE OF A SEARCH CONDUCTED BY AUTHORITY OF AN INVALID SEARCH WARRANT.

A. The search warrant is invalid because the warrant was issued upon evidence consisting in material part of reckless misrepresentation of the applicant to the issuing magistrate.

The affidavit for search warrant (T. 107-108), executed by "Jim Jowers" contains reckless misrepresentations of material facts. The affidavit states that the Petitioner left Henry Shanklin's residence at 2:00 p.m., which according to the affidavit, was the time of the

victim's death fixed by Dr. George Shannon, the Assistant County Medical Examiner. However, the combined testimony of Henry Shanklin (S.E. 26-28) and Mary Jones (S.E. 12), fixed the time that Shanklin and the Petitioner separated at approximately 2:45 p.m. that day, after Shanklin and the Petitioner had been together since approximately 1:00 p.m., without separating (S.E. 28).

Also, the affidavit states that a "reliable source" states that the Petitioner was seen in his 1974 Ford pick-up "immediately prior to the estimated time of her [the victim's] death." Lt. James Jowers testified at the preliminary hearing that Mattie Lewis gave him a statement, relating that she had talked with the Petitioner after she had locked herself out of the victim's house between 12:30 p.m. and 1:00 p.m. Jowers further testifies that no one placed the Petitioner at the residence at 2:00 p.m., which was the time of death fixed by the Assistant County Medical Examiner. The affiant knew that Mattie Lewis had seen the Petitioner between 12:30 and 1:00 p.m. and that Mattie Lewis saw the victim between 1:30 p.m. and 1:45 p.m. at the residence. Instead of giving this specific information, the affiant chose to couch his statement in a deceptive manner. This action on the part of the affiant, the Petitioner contends, could only have been undertaken to deceive the Court.

Taken in the most favorable view toward the affiant, these statements were certainly recklessly made and obviously essential to the establishment of probable cause. The affiant had in his possession specific information which would have certainly eliminated the inferences of the statements made in the affidavit instead.

B. The search warrant is invalid because there were no facts alleged which provided a nexus between the crime and the Petitioner's truck.

The affidavit before this Court alleged no facts to provide a nexus between the crime and the vehicle. Since the Petitioner's truck was seen by Mattie Lewis prior to the victim's return to the residence, the inference that the truck was seen at the house at the time of the murder has been destroyed. Without that inference, there are not facts

set forth in the affidavit which would lead to a reasonable conclusion that any evidence was in the Petitioner's truck. This nexus is a "critical element," citing Whitely v. Warden, 401 U.S. 560 (1971). This critical element is missing in the present case.

- C. The search warrant is invalid because the affidavit does not contain a substantial basis for crediting the hearsay relied upon by the affiant nor the basis for the informant's knowledge.

The finding of probable cause for a search warrant can be based upon hearsay. However, the affidavit must also contain a substantial basis for crediting such hearsay. Spinelli v. United States, 393 U.S. 410 (1969); Rugendorf v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960).

The affidavit must set forth enough facts and circumstances to permit the magistrate to measure the credibility of the information, and to reach an independent judgment as to whether the requisite probable cause exists. Spinelli v. United States, supra; accord, United States v. Harris, 403 U.S. 573 (1971). The affiant must give the magistrate more than the conclusory averment that the informant is "reliable." Aguilar v. Texas, 378 U.S. 108 (1964).

There can be no question about the affidavit in the present case. One unnamed source is only identified as "reliable" with no other supporting facts to allow the magistrate to determine the source's reliability or the basis for the informant's knowledge. The other sources, Kimba B. Lawrence and Henry Shanklin, are named, but no supporting facts as to credibility are given.

- D. The search warrant is invalid because it fails to describe with specificity the things to be seized.

Any search warrant issued by a magistrate must describe with specificity both the things to be seized and the place to be searched. Stanford v. Texas, 379 U.S. 476 (1965). The property for which seizure was authorized in this case is described in broad, general terms. The officer is empowered to seize "a blunt object, knife or object capable of being used to strike, stab, cut, penetrate and any other paraphernalia

pertaining to this incident." (Emphasis added). The lack of specificity on the face of the search warrant authorizes a general search, which is prohibited by the Fourth Amendment to the United States Constitution.

Innocuous property (in contrast to contraband) must be described more specifically so that executing officers will not be confused about the items sought and other property of a similar nature which might be found on the premises. United States v. Quantity of Extract, Bottles, Etc., 54 F.2d 643 (S.D.Fla. 1931).

In this case, the following items were seized from the Defendant's truck:

1. Three rags
2. Shirt
3. Portion of rug
4. Syringe
5. Hammer
6. Two wrenches

Obviously, the executing officers were confused between the items sought and other property. The cloth items do not even fall within the vague and overbroad description given, and neither does the syringe.

E. Whether the search and seizure by the officers exceed the authority of the search warrant.

While the affidavit for search warrant requests that the magistrate allow the search of the vehicle in question to include "all boxes and containers contained in said vehicle," the search warrant only described, and authorized the search of, a "1974 Ford pick-up, green in color, bearing Tennessee license number 7J469A, registered to Hugh W. Melson," without mention of the "boxes and containers." Therefore, the search of the boxes and containers, without proper authorization in the search warrant, is in excess of the search warrant.

In Marron v. United States, 272 U.S. 192 (1927), the warrant in question specified intoxicating liquor and articles for their manufacture. The Court held that seizure of a ledger was not authorized under the warrant (but found that the seizure was constitutional under an exception to the warrant requirement). As previously discussed, the search warrant and the subsequent search and seizure of the property under the warrant in the present case must be relied upon by the State,

as there is no exception applicable to the case at hand. Marron v. United States, supra, holds that the constitutional requirement that warrants shall particularly describe the things to be seized prevents the seizure of one thing under a warrant describing another. As to what should be seized, nothing is to be left to the discretion of the officer executing the warrant. The Marron decision was distinguished in the case of Coolidge v. New Hampshire, 403 U.S. 443 (1971), when the United States Supreme Court ruled that where an otherwise lawful search is in progress, and the police "inadvertantly" come upon a piece of evidence in "plain view," it is not necessary for the officer to obtain a warrant particularly describing the inadvertantly discovered item.

However, the argument of "inadvertant discovery" cannot be used to "bootstrap" all seizures made in a search. In the case at hand, it is clear from the affidavit for the search warrant that the officer knew of the existence and location of the boxes and containers, and that he intended to seize them. On that basis, the fact that the warrant fails to authorize the search and seizure of these items is fatal to the search and seizure of those specific items. See, North v. Superior Court, 502 P.2d 1305 (Cal. 1972). There can be no claim made that there was an "inadvertant" discovery.

Since the warrant did not authorize the search and seizure of the boxes and containers, there is a violation of the Fourth Amendment requirement that the warrant particularly describe the things to be seized.

XI. WHETHER THE PETITIONER'S FOURTH AMENDMENT RIGHT WAS VIOLATED THROUGH SEIZURE OF PETITIONER'S PROPERTY BY AUTHORITY OF AN INVALID SEARCH WARRANT.

The Petitioner was arrested at 4:10 p.m. on April 10, 1980 (S.E. 668). The Petitioner's truck was seized on April 10, 1980, without a search warrant, at approximately 7:51 p.m., at the Lawrence farm (S.E. 703). It was towed into the police garage (S.E. 697). The next day, after a search warrant had been obtained, the truck was searched (S.E. 691, 700). The Petitioner asserts that the seizure of the truck and then the subsequent search by an invalid search warrant infringes upon his protection from unreasonable search and seizure. The State presented no evidence of exigent circumstances. The Petitioner was already in custody. The truck was on the Lawrence property, and there was no imminent danger

of loss of evidence, as a police officer could have been detailed to maintain surveillance of the truck. This action would have constituted a lesser intrusion until a search warrant could have been obtained. See, U.S. v. Van Leeuwen, 397 U.S. 249 (1970); contra, Chambers v. Maroney, 399 U.S. 42 (1970).

The Petitioner argues that (1) there were no exigent circumstances involved, and no reason given for foregoing the procurement of a search warrant to seize the Petitioner's truck; and (2) the search warrant which was eventually procured by the Sheriff's office was invalid. Therefore, the use of the property seized as potential evidence should have been suppressed. Therefore, there has been a violation of the Petitioner's Fourth Amendment Rights.

XII. WHETHER THE TENNESSEE DEATH PENALTY ACT IS
UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EIGHTH AND
FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE
UNITED STATES.

A. The statutory aggravating circumstances used against the Petitioner under the statute are void for vagueness and overbreadth and do not apply to the Petitioner under the circumstances of this case.

The aggravating circumstances set forth in T.C.A. §39-2404 (1) (5) and (6) were found to be present and not outweighed by mitigating factors by the jury in this case. Aggravating circumstance number 5 is "the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind" and aggravating circumstance number 6 is "the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the Defendant or another."

With reference to circumstance (5), the Petitioner contends that it is impermissably vague, in that the jurors were given no instruction on what constitutes "depravity of mind." Clearly, the word torture used in the aggravating circumstance is within their common knowledge and understanding. However, "depravity of mind" needs definition before they may apply it. In this regard, the victim in this case clearly was not tortured, as her death due to a skull fracture came swiftly and quickly (S.E. 1013, 1032).

In Godfrey v. Georgia, 446 U.S. 420 (1980), [hereinafter cited

as Godfrey], citing the Georgia Supreme Court construing a very similar Georgia statute, the Court found that the Georgia Supreme Court interpreted the phrase "depravity of mind" to encompass "only the kind of mental state that lead the murderer to torture or commit aggravated battery before killing his victim." Aggravated battery was found to be construed in pari materia with torture so as to require evidence of serious physical abuse to the victim before death.

In the present context and under the above interpretations under Godfrey, the Petitioner should be found not to have committed the aggravating circumstance number 5 with which he has been charged. As noted above, the victim's death came swiftly and quickly and therefore she could not have been tortured or otherwise physically abused prior to death. Thus, if there was no torture prior to death, then "depravity of mind" cannot be found in the present context under the holding of Godfrey.

In regard to aggravating circumstance number 6, that "the murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the Defendant or another", the Petitioner submits that the statute is vague and overbroad on its face, and as applied in this particular case. This aggravating circumstance is so broad that it encompasses any murder. It could be argued that any murder in which the assailant does not step forward and immediately admit guilt is committed for the purpose of avoiding and preventing a lawful arrest or prosecution. In addition, in this case the jury was not charged with, nor were they made aware of, any circumstances which might merit a lawful arrest or prosecution of which the Petitioner might have then been attempting to avoid. Clearly the victim did not intend to arrest or prosecute the Petitioner or she would have taken these steps prior to her death. At most, it simply would have lead to his dismissal from his employment.

B. Petitioner's sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the Defendant.

T.C.A. §39-2406 (c)(4) provides that part of the Tennessee Supreme Court's task in reviewing a death sentence is to determine

whether "the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." The Petitioner contends that there are substantial deficiencies in the statutory scheme concerning proportionality review which render it constitutionally deficient. However, even if that statutory scheme is found to be constitutionally adequate, Petitioner submits that his sentence is disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the Petitioner.

Petitioner's counsel, in reviewing the limited sources available to them in similar cases, has concluded that there are five cases similar to Petitioner's case which should be compared in determining whether his sentence is disproportionate to other similar cases. All six of these cases are similar, "considering both the nature of the crime and the defendant." They involve crimes similar in their circumstances and defendants similarly culpable. The only differences in these cases, however, is that Petitioner was sentenced to death and four of the other men were sentenced to life imprisonment (one case has been remanded for a new sentence hearing). On the basis of the facts available about all six of these cases, the differences in the sentences imposed on the individuals cannot be justified. Under no view of the facts of all six cases is Mr. Melson a "worse" person or is his crime a "worse" crime. The results here are, therefore, precisely the kind of aberrant results which proportionality review is designed to prevent. Gregg v. Georgia, 428 U.S. 153, at 206 (1976).

C. The review procedure for conducting proportionality review in Tennessee does not serve as a check against the random or arbitrary imposition of the death penalty and does not comply with the constitutional review and requirements.

T.C.A. §29-2406, governing review of capital sentences by the Tennessee Supreme Court provides that in a death penalty appeal the Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the Court is required, among other things, to determine "whether ... the sentence of

death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." T.C.A. §39-2406 (c) (4).

The review provisions of T.C.A. §39-2406 were adopted literally from the parallel provisions of Georgia's death penalty statute affirmed by this Court in Gregg v. Georgia, 428 U.S. 153 (1976). Those provisions in Georgia's statute have been found by this Court to be a critically important component in the Georgia statute's attempt to avoid the arbitrary imposition of the death penalty previously condemned in Furman v. Georgia, 408 U.S. 238 (1972).

The review provisions of T.C.A. § 39-2406 require this Court to make the same kind of determination that the Georgia Supreme Court makes under its law, but provides the Court with no procedure parallel to that used in Georgia to perform the task. This procedure does not enable the Court to proceed with this sentence review in a manner that is efficient, fair, reliable, and in compliance with the requirements of Gregg and its companion cases.

D. Failure to inform the jury that under the Tennessee death penalty act one juror can prevent a death sentence denies the Defendant due process of law.

The Petitioner submits that the guidance given to the jury should be complete and must include not only the unanimous verdict requirements in T.C.A. §39-2404(f), but also the alternative if they can't reach a unanimous decision ... an alternative that is prohibited in T.C.A. §39-2404(h). To instruct the jury in terms of what will happen if they "unanimously determine" aggravating circumstances, T.C.A. §39-2404 (f) and (g), without informing them of the alternative if they fail to reach a unanimous verdict, implies that some form of unanimous decision is required. However, this represents an incorrect understanding of the law, for "[i]f the jury cannot ultimately agree as to the punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment," T.C.A. §39-2404(h). With an incomplete instruction, the jurors are left to speculate that a defendant might be retried or subject to a new sentencing hearing if they fail to achieve

unanimity.

T.C.A. §39-2404(h) does not justify the failure to give this instruction. As the Petitioner has demonstrated, there is a constitutional underpinning for the need for this instruction, since it insures that the decision to impose the death sentence meets the concerns addressed in numerous decisions of the Supreme Court of the United States. See, e.g., Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153, 189 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Therefore, a legislative pronouncement that inevitably leads to the introduction of a "level of uncertainty and unreliability into the fact-finding process ... cannot be tolerated in a capital case." Beck v. Alabama, 447 U.S. 625 (1980).

E. T.C.A. §39-2404(j) is unconstitutional in that it violates the Petitioner's right to even-handed procedures in capital cases guaranteed by the Eighth and Fourteenth Amendments of the United States Constitution, failing to require the jury to make specific findings as to the presence or absence of mitigating circumstances and thereby preventing effective review on appeal under T.C.A. §39-2406(c)(3).

The due process requirements of the Fourteenth Amendment to the United States Constitution and the requirements of the Eighth Amendment to the United States Constitution demand that juries, in sentencing proceedings, be guided in considering both mitigating and aggravating circumstances. Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Further, these Amendments require effective appellate review of death verdicts in order to insure that the sentencer has not over-stepped its bounds and arbitrarily imposed a death sentence. Godfrey v. Georgia, 446 U.S. 420 (1980); Gregg v. Georgia, 428 U.S. 153 (1976) (this Court approved, though did not require, proportionality review by the State Supreme Court).

The jury's failure to specifically find mitigating circumstances invites arbitrary and freakish application of the death sentence because on review this Court is presented with two separate findings of fact made by separate entities, one made by the jury and the other made by the Trial Court. The Court is then required to presume that the Trial

Court's findings on mitigating circumstances are the same as those actually found by the jury. Such a presumption violates all tenets of procedural fairness. Therefore, the proportionality review required of this Court by T.C.A. §39-2406(c) cannot be effectively conducted.

F. T.C.A. §39-2404(f) and §39-2404(g) are unconstitutional in that these sections deny the Petitioner due process guaranteed by the Fourteenth Amendment of the United States Constitution.

1. Failure to specify who has the burden of proof regarding whether the aggravating circumstances outweigh the mitigating circumstances; and

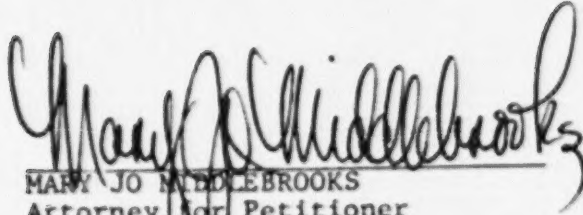
2. Failure to provide a standard of proof for determining whether the aggravating circumstances outweigh the mitigating circumstances.

The Petitioner contends that T.C.A. §39-2404(f) and (g) are unconstitutional in that these subsections fail to provide an adequate standard of proof whereby the jury may be informed as to who must prove that aggravating circumstances outweigh mitigating circumstances. Without being informed as to who must prove that aggravating circumstances outweigh mitigating circumstances, and without being given any guidance upon how to determine the weight of these circumstances, the jury is permitted the type of untrammelled discretion condemned in Furman v. Georgia, 408 U.S. 238 (1972).

CONCLUSION

For the reasons stated above, a Writ for Certiorari should be granted to review the judgment and opinion of the Supreme Court of Tennessee.

Respectfully submitted,

A large, stylized handwritten signature in dark ink, appearing to read 'Mary Jo Middlebrooks', written over a horizontal line.

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A large, stylized handwritten signature in dark ink, appearing to read 'William H. Brown', written over a horizontal line.

WILLIAM H. BROWN
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STATE of Tennessee, Plaintiff-Appellee,

v.

Hugh W. NELSON, Defendant-Appellant.

Supreme Court of Tennessee,
at Jackson.

Aug. 16, 1962.

Defendant was convicted before the Criminal Court, Madison County, Gene Walker, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Drowota, J., held that: (1) evidence was sufficient to sustain conviction; (2) affidavit in support of search warrant need not set forth material establishing credibility of "citizen-informants;" (3) refusal to permit defendant to participate in his own defense was not abuse of discretion; (4) denial of motion for change of venue was not abuse of discretion; (5) imposition of death sentence was not a disproportionately severe punishment, considering both the crime and the defendant; (6) provision within death penalty statute is not unconstitutional on theory that it prevents adequate review by failing to require jury to specify what mitigating circumstances had been considered and found to be absent and insufficient to outweigh the aggravating circumstances; and (7) the statute's provision, which provides for closing argument first by state, then by defendant, and last by state, is not unconstitutional.

Affirmed.

Brock, J., dissented in part and concurred in part and stated his reasons.

1. Criminal Law — 268, 1159.2(7)

Person convicted of crime has lost presumption of innocence which he carried at trial; Supreme Court, after viewing evidence in light most favorable to state, must affirm a conviction if any rational trier of fact could have found defendant guilty beyond a reasonable doubt. Rules App.Proc., Rule 12(a).

2. Homicide — 253(1)

Evidence, including evidence that victim and defendant had argument over his having taken gasoline, that ballpeen hammer found in defendant's truck could have been the murder weapon, that hair found on hammer and embedded in substance suspected to be blood matched victim's hair, that hair found on victim's blouse matched defendant's hair and that spattered bloodstain patterns on defendant's clothing could have resulted from a head being repeatedly struck with blunt instrument, was sufficient to sustain defendant's conviction of first-degree murder.

3. Arrest — 63.4(3)

Though probable cause for warrantless arrest must be more than mere suspicion, it is not required that there be absolute certainty. T.C.A. § 40-606(3).

4. Arrest — 63.4(2)

Reasonable or probable cause for warrantless arrest consists of grounds which would lead a reasonable man to believe that person arrested was guilty of the felony. T.C.A. § 40-606(3).

5. Arrest — 63.4(6)

Officers, who were informed that murder victim had an altercation with defendant in regard to his having taken gasoline and who noticed what looked like bloodstains on his clothing, had probable cause to make warrantless arrest of defendant. T.C.A. § 40-606(3).

6. Criminal Law — 1114(1)

Search warrant was not reviewable on appeal where the only place in record in which warrant appeared was as an attachment to a memorandum in support of a motion, it was not referred to in the memorandum as being incorporated therein and it was not introduced as evidence at the suppression hearing.

7. Searches and Seizures — 3.6(1)

Search warrant may be invalidated on ground that affidavit in support of the warrant contains reckless misrepresentations of material facts.

8. Searches and Seizures — 3.6(1)

In prosecution for first-degree murder, evidence did not preponderate against finding that affidavit in support of warrant to search defendant's truck had not contained any intentionally or recklessly made false statements.

9. Searches and Seizures — 3.6(4)

Fact that references in affidavit in support of search warrant for defendant's truck were arguably uncertain as to when defendant had argument with murder victim and when her daughter-in-law learned of the argument was not sufficient to invalidate the warrant, in view of fact that it was clear that the incident was present in defendant's mind near the time of the murder.

10. Searches and Seizures — 3.7

Warrant's description of the property to be searched for and seized from truck as "a blunt object, knife, or object capable of being used to strike, stab, cut, penetrate, and other paraphernalia pertaining to this incident" was sufficiently specific.

11. Searches and Seizures — 3.7

Search of tool box within truck was not unlawful due to fact that search warrant omitted any reference to boxes or containers where the affidavit requested authority to search any box or container in truck and the omission was merely inadvertent.

12. Searches and Seizures — 3.6(3)

Affidavit, which was in support of search warrant and which referred to information supplied by "citizen-informants," need not set forth material establishing credibility of the "citizen-informants."

13. Searches and Seizures — 3.6(3)

Mere fact that identity of a citizen informant was not disclosed in affidavit in support of search warrant did not preclude issuance of the warrant.

14. Searches and Seizures — 3.6(1)

Generally, affidavits in support of search warrants must be looked at and read in a common sense and practical manner.

15. Searches and Seizures — 3.9

Generally, a finding by issuing magistrate that there is probable cause for issuance of a search warrant is entitled to great deference.

16. Searches and Seizures — 3.6(4)

Affidavit, in which officer referred to information supplied by several citizen informants including fact that informant was told by defendant that he was in "a heap of trouble" because murder victim had caught defendant stealing gasoline and that defendant's truck had been seen at victim's residence, sufficiently established that there was probable cause for issuance of warrant to search truck.

17. Bail — 51

Trial court has very wide latitude in setting bail. Const. Art. 1, §§ 15, 16; U.S.C.A. Const. Amend. 8.

18. Criminal Law — 1134(3)

Even if amount at which bail was set was excessive, such would not have entitled defendant to relief on appeal from conviction because it was not more probable than not that it affected outcome of the case; defendant's only effective remedy would have been to follow rule, which governed review of orders affecting release conditions, promptly after bail was set. Const. Art. 1, §§ 9, 15, 16; U.S.C.A. Const. Amend. 8, 8; T.C.A. § 40-1204.

19. Criminal Law — 641.10(3)

Defendant has right to either be represented by counsel or to represent himself. It is entirely a matter of grace for a defendant to be permitted to represent himself and have counsel, and such privilege should be granted only in exceptional circumstances. Const. Art. 1, § 9; U.S.C.A. Const. Amend. 6.

20. Criminal Law — 641.10(3)

Mere fact that defendant is not seeking to disrupt trial proceedings and that he may be intelligent does not require trial judge to allow a defendant represented by counsel to participate in his own defense. Const. Art. 1, § 9; U.S.C.A. Const. Amend. 6.

21. Criminal Law — 641.10(3)

Refusal to permit defendant, who was charged with first-degree murder and who was represented by two very competent attorneys, to participate in his own defense was not abuse of discretion, though it assertedly was evident that trial would be lengthy and complex and though the case involved death penalty. Const. Art. 1, § 9; U.S.C.A. Const. Amend. 6; Rules App. Proc., Rule 36(b).

22. Criminal Law — 605

Denial of motion for continuance one week before murder trial was not abuse of discretion under circumstances in which there was no showing that defense counsel could not have obtained the evidence and assistance referred to in the motion sooner than she did and in which, in regard to the ground that the defense had not received the report of mental examinations conducted at certain institute, the court had allowed psychological evaluator from the institute to give highly favorable testimony for the defense.

23. Criminal Law — 121, 1158

Decision whether or not to change venue is for sound discretion of trial court and may not be reversed on appeal absent a clear abuse of such discretion. Rules Crim. Proc., Rule 21.

24. Criminal Law — 121

In proceeding in which defendant was convicted of first degree murder and was sentenced to death, denial of motion for change of venue was not abuse of discretion, in view of fact that the publicity had been factual and fair and occurred only between death and indictment which was returned five months before trial, that none of selected jurors who had heard about the crime had formed an opinion, that defendant did not exhaust his peremptory challenges until very late in voir dire and that county in which trial took place was one of more populous areas in state. Rules Crim. Proc., Rule 21.

25. Jury — 131(13)

In prosecution for first-degree murder, refusal to require individual voir dire and

sequestration during portion of voir dire relating to employment, family, health and outside activities was not error.

26. Criminal Law — 633(1)

Not only the defendant, but also state, is entitled to fair and impartial trial.

27. Constitutional Law — 250.2(4)**Jury — 33(2.1)**

In prosecution for first-degree murder, exclusion of jurors, who were opposed to death penalty and would automatically vote against it, did not violate defendant's rights to impartial trial and to equal protection; defendant's interests were sufficiently represented by jurors who were reluctant to impose death penalty. U.S.C.A. Const. Amend. 14.

28. Jury — 131(8)

In first-degree murder prosecution in which a venireman indicated that it had been stated in the venire waiting room, during the second day of voir dire, that capital punishment was being asked about and that "some of them said they were against it and that's why they were being relieved," trial court did not abuse its discretion in excluding only that venireman and failing to conduct any further voir dire on that subject. U.S.C.A. Const. Amend. 14.

29. Criminal Law — 1036.2

Issue whether trial court erred in declaring certain person to be expert witness and admitting his testimony could not be raised on appeal from conviction where defendant failed to object to ruling qualifying the witness and conducted no cross-examination of him during the qualification process.

30. Criminal Law — 478(1)

In prosecution for first-degree murder, interpretation of bloodstain patterns was an area of expertise so as to permit admission of expert testimony on such subject.

31. Criminal Law — 628(6)

In criminal proceeding, admission of testimony of witness, whose name was not endorsed on indictment and assertedly was

not furnished to defendant pursuant to his discovery request, was not error, in view of fact that repeated mentioning of the witness' name during voir dire prevented defendant from being surprised when the witness was called.

32. Criminal Law — 438(1)

Generally, admissibility of photographs is a matter to be determined by trial court in exercise of its sound discretion.

33. Criminal Law — 438(1)

Photographic evidence must be relevant to an issue in dispute in order to be admissible, and even relevant evidence should not be admitted if its prejudicial effect outweighs its probative value.

34. Criminal Law — 438(4)

In first-degree murder prosecution in which defendant did not dispute the cause of victim's death, admission of crime scene photographs was not abuse of discretion, in view of fact that they were relevant on issues of whether there was premeditation and deliberation and whether the substance all over room had been blood and on issue as to how the blood got where it did.

35. Criminal Law — 476

In prosecution for first-degree murder, FBI agent's testimony that hair found on victim's blouse matched samples from defendant's head, that hair found on defendant's hammer matched hair from victim's head and that blood on defendant's clothing and hammer was human blood rather than hog blood was admissible, contrary to defendant's contention that such testimony was too speculative to be admissible and that its prejudicial effect outweighed its probative value.

36. Criminal Law — 629(22)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal to give requested instructions that decision to afford an individual defendant mercy did not violate Constitution and that, in setting punishment, jury was to weigh evidence in aggravation and mitigation but was not to be influenced by passion, prejudice or other

arbitrary factor was not error, in view of fact that such requested instructions were reflected in the instructions actually given T.C.A. § 39-2404.

37. Homicide — 311

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal to give requested instructions that jury need not find any mitigating circumstance in order to return life sentence, that life sentence could be returned regardless of the evidence, that, in order to impose a death sentence, the jury must be unanimous and that if jury could not reach a unanimous decision, defendant would be sentenced to life imprisonment was not error. T.C.A. § 39-2404.

38. Homicide — 354

If no aggravating circumstance is proved by state beyond a reasonable doubt in proceeding in which defendant is convicted of first-degree murder, jury must then return a life sentence without having to consider mitigating circumstances, but if state does prove an aggravating circumstance beyond reasonable doubt, then unless the jury finds that mitigation exists and outweighs the aggravating circumstance, it can only impose the death penalty. T.C.A. § 39-2404.

39. Homicide — 311

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal to give requested instructions that jury, in its deliberations, was to presume that if it imposed life sentence, defendant would spend rest of his life in prison, that if it imposed death sentence, defendant would be electrocuted and that jury was to make no other presumptions was not error, in that such requested instructions did not fully and fairly reflect what jury was to consider. T.C.A. § 39-2404.

40. Homicide — 351

Aggravating circumstance, which is referred to in death penalty statute and which consists of the murder being especially heinous, atrocious or cruel in that it

involves torture or depravity of mind, is not unconstitutionally vague and overbroad. T.C.A. § 39-2404(i)(5).

41. Homicide — 354

Killing, in which victim had time to realize what was happening and in which she was struck up to 30 times, so as to cause room to be covered with spray of blood and cause her brains to extrude through gaping hole in skull, evinced "depravity of mind" within meaning of death penalty statute's aggravating circumstance consisting of murder which was especially heinous, atrocious and cruel in that it involved torture or depravity of mind. T.C.A. § 39-2404(i)(5).

See publication Words and Phrases for other judicial constructions and definitions.

42. Homicide — 354

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, evidence warranted finding that the aggravating circumstance, consisting of committing a murder to prevent arrest or prosecution, was present. T.C.A. § 39-2404(i)(6).

43. Criminal Law — 1206(2)

Imposition of death sentence for first-degree murder, in which victim was killed because she threatened to expose defendant's alleged theft of gasoline and in which victim was struck up to 30 times so as to cause room to be covered with blood and cause her brains to extrude through her skull, was not a disproportionately severe punishment, considering both the crime and the defendant. T.C.A. § 39-2404.

44. Criminal Law — 1206(2)

Sentencing review process established under death penalty statute and Supreme Court Rule is not unconstitutionally inadequate to afford a meaningful proportionality review. T.C.A. § 39-2406; Sup.Ct. Rules, Rule 12.

45. Criminal Law — 1206(1)

Presence of the exclusive list of possible aggravating circumstances set out in death penalty statute is adequate notice thereof to a defendant, without his being

specifically notified by state of the particular ones on which it is relying. T.C.A. § 39-2404(h).

46. Homicide — 351

Provision of death penalty statute is not unconstitutional on theory that it prevents adequate review by failing to require jury to specify what mitigating circumstances have been considered and found to be absent and insufficient to outweigh the aggravating circumstances. T.C.A. §§ 39-2404(j), 39-2406(c)(3).

47. Homicide — 351

Death penalty statute's provision, which provides for closing argument first by state, then by defendant, and last by state, is not unconstitutional. T.C.A. § 39-2404(d).

48. Homicide — 351

Death penalty statute is constitutional. T.C.A. §§ 39-2404 to 39-2406.

George W. Hymers, Dist. Atty. Gen., James G. Woodall and R. C. Stegall, Asst. Dist. Attys. Gen., Franklin Murchison, Sp. Prosecutor, Jackson, William M. Leach, Jr., Atty. Gen., Gordon W. Smith, Asst. Atty. Gen., Nashville, for plaintiff-appellee.

Mary Jo. Middlebrooks, William H. Brown, Jackson, for defendant-appellant.

OPINION

DROWOTA, Justice.

In this case, Hugh W. Melson appeals directly to this Court his conviction of first degree murder and the sentence of death imposed by the jury. He raises numerous issues in this appeal, but, after careful review of the entire record and the law, we find these issues to be without merit. We therefore affirm the conviction and the sentence.

The tragic and shocking killing for which Melson was convicted occurred on April 10, 1980. The victim was Barbara Lawrence, wife of Jack Lawrence, who owned a sizeable farm near Jackson. Melson was the farm foreman and had worked for the Law-

rences for years. He had known the family since his boyhood, as his father had also worked for them. Although Mr. Lawrence testified that Melson had had his problems getting along with people, he had been a satisfactory employee and no one had any real complaints about his prior behavior. He had a wife and family and lived on the Lawrence place.

SUFFICIENCY OF THE EVIDENCE

[1] The first issue which we shall address is Melson's challenge to the sufficiency of the evidence on which he was convicted. He argues that the verdict is contrary to the law and the evidence; and that the evidence preponderates in favor of his innocence and against his guilt. Since he stands convicted of this crime, he has lost the presumption of innocence which he carried at trial. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn.1973). All conflicts in the testimony must be resolved in favor of the State. *State v. Hatchett*, 560 S.W.2d 327, 630 (Tenn.1978); *State v. Townsend*, 525 S.W.2d 842, 843 (Tenn.1975). After viewing the evidence in the light most favorable to the State, we must affirm the conviction if any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); TRAP 13(c).

[2] Jack Lawrence testified that in months prior to the killing, too much property (a chemical tank, chain saws, ladders, etc.) had been missing from the farm. Worst of all was theft of gasoline. During winter, Lawrence could not even attempt to keep gasoline at the farm. When the spring of 1980 arrived, and gasoline was again needed for farm work, Lawrence had the switch which operated the gasoline tank moved to a closet inside the house. He called all the farm workers together and told them that a log would be kept of all gasoline being used, even for personal purposes, and even by himself and his sons. He had told Melson that he could put a tank full in his truck every week, but Melson said that he would not need any until "combine time." Lawrence told Melson, then, to

remove the gas cans and siphoning hoses from his truck.

Early on the morning in question, Jack Lawrence and his son, Dick, who also lived with his own family on the farm, left home to spend the day fishing. Melson was at the main house to do some plumbing repairs. Mrs. Lawrence was at home, and their maid, Mattie Lewis, arrived at about 7:45. She testified that Melson was working on the hot water heater, which was in the utility room off the kitchen. She was in the den nearby; and at one point, Melson came in, opened the closet where the switch to the gasoline tank was, and went outside. Barbara Lawrence came in, asked who had opened the closet, and squatted down behind the bar. When Melson came back inside and went toward the closet, Mrs. Lawrence stood up, went outside to Dick Lawrence's truck, and returned to the house, telling Melson that he had taken some gas (in cans, in the bed of the truck) for himself. He denied this. She reminded him that her husband had told him that he could fill up once a week, and wrote the amount in the log book as going to Melson. He told her that he didn't want any of her gas and told her not to write it down. They both went outside and had some words. When she came back to the house, she was running, and had tears in her eyes.

A little while later, Mrs. Lawrence telephoned Kimba Lawrence, wife of her son Dick. She asked Kimba to do an errand which she had been planning to do. She stated that she was upset, telling Kimba the reason and the name of the person who had caused her to be upset. She stated that she did not want to leave the house. Kimba went to the Jack Lawrence house at about 9:00 A.M. and saw Mrs. Lawrence.

At about 11:00, Mrs. Lawrence and Jack Lawrence's mother met Kimba at a restaurant for lunch. While they were eating, Mrs. Lawrence told Kimba that the knot was finally leaving her stomach. The elder Mrs. Lawrence was present but did not hear that conversation. After lunch, all three women rode in Mrs. Lawrence's car to look for someone's house, then returned to the

restaurant, where Kimba got her own car and went her way.

At about 12:15, Mattie Lewis locked her self out of the house. After walking to the home of another son, Jack Lawrence, Jr., to see where a key might be, she returned to the house and was sitting outside when Melson drove up in his truck. She asked if he had a key, and he responded angrily, asking if she had not "heard Miss Barbara raising hell with him about the gas." "He said that Miss Barbara couldn't tell Mr. Jack and have Mr. Jack coming back there raising hell with him." He also asked Mattie Lewis to tell Mrs. Lawrence that he had their aluminum ladder.

Mrs. Lewis waited another fifteen or twenty minutes, and was driving in her own car down the road, when Barbara Lawrence drove by. They both drove to the home of Jack Lawrence's mother, then went to Barbara's house in her car. After Mrs. Lewis worked for awhile longer, discovering that there still was no hot water, Mrs. Lawrence took her back to her car, and they separated.

Meanwhile, according to Henry Shanklin, a retired farm hand who still lived on the place, Melson arrived at his house to repair the roof at about 1:00. A relative of Shanklin, Jerry Ingram, was also there. Ingram and Shanklin went to work giving shots to and putting rings in the noses of two hogs. When Melson finished on the roof, he helped with the hogs. Ingram then left with his wife, Dora, and Shanklin's daughter.

Shanklin and Melson got into Melson's truck and drove to a store on the main road to buy two quart bottles of beer. When they were almost out to the road, they saw Mrs. Lawrence drive past. Melson said to Shanklin that he was in a world of trouble because Mrs. Barbara Lawrence saw him taking gasoline. Shanklin responded, "ah, you ain't in no trouble," but Melson repeated that he was. Mattie Lewis testified that as she was driving away from the elder Mrs. Lawrence's home, she saw Melson and a passenger behind her in Melson's truck.

The proprietress of the store, Mary Jones, stated that Melson came in and made the purchase at about 2:30, remaining only briefly. When the two arrived back at Shanklin's house, Melson let Shanklin out and drove on, saying that he had to go and do "his other little job."

At about 3:00, Melson returned in his truck to Shanklin's, called out to him, and came inside, where he drank most of his beer. Shanklin said that he was "some different" he seemed more tired, but not out of breath. Shanklin's daughter and Dora Ingram came back. When Melson heard them approaching, he appeared uneasy, got up, turned around and looked

A few minutes after 3:00 P.M., the Lawrences' third son Jon, who was a high school student, arrived home. He noticed that the door was unlocked, which was unusual. When he went to the kitchen to get a snack, he discovered his mother dead on the utility room floor. He ran to Kimba Lawrence, who had just arrived at her home nearby, and who called the sheriff's office. Deputies began arriving at about 3:30 and closed off the area where the killing took place. Kimba immediately told the deputies of Mrs. Lawrence's altercation with Melson, and some officers went off in search of him.

They eventually found him sitting inside Shanklin's house at about 4:10 P.M. The officers asked him to come outside, and they told him that they were "investigating an incident." They took him to the Lawrence house in the back seat of their car. When they arrived, there were many people milling about, and there were official cars and an ambulance parked outside. The officers read Melson his *Miranda* rights, which he affirmatively indicated he understood. Then, one of the officers noticed spots of blood on his clothing, which did not appear dry, darkened or faded; and asked him about it. He said that it had gotten on him when he was "shooting hogs." He was not interrogated further at that time, but was taken to the county jail.

During the entire time, he never inquired what had happened or why he was being held. He never showed surprise, mystifica-

tion, or curiosity. He was quiet and cooperative.

The sheriff's deputies and local medical examiner described the death scene, and pictures and diagrams were introduced into evidence. Mrs. Lawrence was lying face down on the utility room floor with her feet near the kitchen. She was lying in a large pool of blood running from her head through and into the kitchen. There was a great deal of blood splattered around the room, on the floor and several feet up the walls. Particles of brain and skull were on the floor. Mrs. Lawrence upon initial examination was found to have a gaping hole in the back of her skull, through which portions of her brain extruded.

At the hospital, a more complete examination was done. Her skull was broken and there were pieces of cranium inside her head. There were bruises and injuries to the eye, face, neck and chin. There were also trauma to her arms and a broken finger, which were consistent with defensive injuries which one would sustain while fending off blows. The conclusion was that the injuries had most likely been caused by blows from a blunt instrument. The time of death was at first estimated to be about 2:00 P.M., but was soon revised to 3:00 P.M. None of the blood had begun to dry when the officers arrived at 3:30.

The body was then sent to Memphis for a complete autopsy. The official cause of death was multiple blunt trauma to the head and neck. The weapon was a firm instrument with different surfaces, one being circular. There had been approximately 15-30 blows to the head, with additional ones to the arms and hands. There would have been considerable force applied with repeated blows in the same area, in order to drive a hole of this magnitude in the skull, even by a strong assailant.

Early on the evening of the 10th, Melson's truck was impounded and sealed in the basement of the county jail. A warrant was issued the next afternoon, and the truck was searched. Recovered were some pieces of cloth, a syringe; and, inside a tool box, a ball peen hammer and a crescent

wrench. All of these, except the syringe, had what could have been blood on them. (We surmise that the syringe was taken because of Melson's story about getting blood on him while giving shots to hogs.) The shape of the ball peen hammer was consistent with the wounds and bruises suffered by Mrs. Lawrence.

Also found on the hammer, imbedded in the substance suspected to be blood, was a hair. Found on Mrs. Lawrence's blouse was another hair. Samples of hair were taken from Melson and Mrs. Lawrence. An FBI agent testified about hair characteristics and matching. He stated that, when the twenty or so characteristics of a hair match a known sample, there is only one chance out of 4,500 or 5,000 that the unknown hair came from a different individual. Further, the unknown person would have had to be in the same place as the known person. The hair on Mrs. Lawrence's blouse exactly matched the samples from Melson's head. The hair on the hammer exactly matched hair from Mrs. Lawrence's head. Making it even less likely that the hair on the hammer had come from anyone else was the fact that such hair had no root on it, it had been broken or torn off in the middle of the shaft, showing that it had come out as the result of force being applied.

Another FBI agent, an expert in forensic serology, testified about the nature of the substance on Melson's clothing (sweat shirt, pants and boots) and the objects from his truck. He described the process by which he identified blood on the clothing, the hammer and the wrench. Further, on the clothing and hammer, but not on the wrench, there was enough blood to determine that it was human. The agent found that the blood did not come from hogs. There was not enough blood in any spot to identify the blood type or grouping.

A very important witness was Mr. Herbert L. MacDonnell, who was, to simplify his occupation, an expert in the character of various types of blood stains. He examined Melson's clothing after the FBI had determined it to be stained with human blood. He found over 550 tiny spots of blood on

the shirt and pants. On the shirt, the blood was concentrated on the right front and right forearm. It was spattered all over the front of the trousers. There was blood on the underside of the right pocket flap on the shirt, showing that Melson's right side was in motion when the blood hit him. This was consistent with a raising of the right arm. The shirt would have had to be very close to the source of the blood, in order for a spot to have been produced there.

There was also a spot on the back of the shirt, over the right shoulder or shoulder blade area. This was consistent with blood dripping off the weapon as the right arm was raised over the shoulder. There was also a stain on the shirt, which was made by wiping. In his expert opinion, the outline of the hammer was reflected in the outline of this stain.

Some stains were spattered on the left side of the right boot, and on the brim of the cap.

MacDonnell gave an extremely clear explanation, accompanied by a demonstration, of the difference between a typical drop of blood and the spray on Melson's clothes. The latter were very fine droplets which could not have been produced without some kind of energy to overcome the surface tension of a normal sized drop of blood. That is, some force had been applied which had caused the drops to pelletize. The number of droplets present would have required several impacts, not just a few blows. The spots resulted from medium velocity blows, about 25 feet per second, which force was consistent with beatings and stabbings. The entire scenario was consistent with what would happen when a head was struck repeatedly by a blunt instrument.

Based upon the foregoing circumstantial evidence, we have no hesitancy in holding that the evidence against Melson was sufficient to support the first degree murder conviction beyond a reasonable doubt. The evidence does not preponderate in favor of his innocence and against his guilt.

VALIDITY OF WARRANTLESS ARREST

When the officers arrived at the Lawrence home in response to the call about finding Mrs. Lawrence, they had a conversation with Mrs. Lawrence's daughter-in-law, Kimba Lawrence. Kimba told them of the discussions which she had had earlier that day with Mrs. Lawrence. As a result of this report, the officers went to where Melson was at the time: at the home, on the Lawrence farm, of the retired farm hand, Henry Shanklin. They took him into custody, handcuffed him, and took him by car back to the Lawrence house. There they noticed what looked like spots of blood on his clothing and formally arrested him, advising him of his rights. All of this took place within about an hour of Mrs. Lawrence's body being found.

[3.4] Since there was no warrant, we must pass upon the validity of the arrest under the statute permitting an officer to make a warrantless arrest when a felony has been committed and he has reasonable or probable cause to believe that the arrestee committed the felony. TCA § 40-603(3). It is conceded that probable cause must be more than mere suspicion, *West v. State*, 221 Tenn. 178, 425 S.W.2d 602 (1969), but neither must it be absolute certainty, *Grey v. State*, 542 S.W.2d 102 (Tenn. Cr. App. 1976). Reasonable or probable cause consists of grounds which would lead a reasonable man to believe that the person arrested was guilty of the felony, *Davis v. State*, 2 Tenn. Cr. App. 297, 453 S.W.2d 438 (1969). In *Davis*, we quoted from *Jones v. State*, 161 Tenn. 370, 33 S.W.2d 59 (1930), wherein it was stated:

"In *Beck v. State of Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), the [United States Supreme] Court stated:

"Whether that arrest was constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to

warrant a prudent man in believing that the petitioner had committed ... an offense."

453 S.W.2d at 440.

"In dealing with probable cause, one deals with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Draper v. United States*, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327." *State v. Jefferson*, 529 S.W.2d 674, 689 (Tenn.1975).

[5] We hold that the trial court was entirely correct in ruling that probable cause for Melson's arrest had existed, at the time they took him into custody at Shanklin's house on the basis of what Kimba Lawrence had related, and certainly after they observed what was apparently blood on his garments in view of the quantities of blood which had been shed at the murder scene. Therefore, the evidence taken from Melson incident to the arrest—his cap, shirt and trousers and boots—was admissible at trial. This issue is without merit.

VALIDITY OF SEARCH WARRANT

[6] Defendant attacks the validity of the search warrant issued to authorize the search of his truck, which was retrieved from Henry Shanklin's residence early in the evening of the murder, towed to police headquarters, and sealed there, not being entered until after the issuance of the warrant. This took place at 1:55 P.M. the next day, April 11, 1980.

We have serious problems in reviewing the merits of this argument. On September 26, 1980, defendant filed a Motion to Suppress Evidence and Return Property, disputing both the warrantless arrest of defendant, which we have already dealt with, and the validity of the search warrant. The language of the grounds in support of the Motion is ambiguous, but they appear to be essentially as follows: (1) That there was no probable cause to issue the warrant, and no justification for a warrantless search. (2) That the information on which the warrant was issued could not

have been verified on the face of the warrant. (3) That it was not properly executed. (4) That the evidence seized was beyond the scope of the warrant. (5) Any other reason presented at the oral hearing.

On October 10, defendant filed a Memorandum on Motion to Suppress Evidence. This did not purport to amend the September 26 Motion, but some of the issues argued in the Memorandum were different from the grounds in the Motion. New grounds were: (1) That the warrant was issued based upon reckless misrepresentation of the affiant to the issuing officer. (2) The affidavit did not establish a time reference for many of the facts stated. (3) The affidavit did not provide a nexus between the crime and the truck. On the other hand, the ground in the Motion that the warrant was not properly executed was apparently abandoned; it was never mentioned again.

Stapled to the October 10 Memorandum was a photocopy of the search warrant. Thus, the only place in the record in which the warrant appears is as an attachment to a memorandum in support of a motion. It is not referred to in the memorandum as being incorporated therein. It was not introduced as evidence at the suppression hearing. Despite the provisions of TRAP 24 abolishing the distinction between the bill of exceptions and the technical record, we must say that the manner in which the warrant was placed in the record falls short of what is needed in order for it to be reviewable on appeal. *Krause v. Taylor*, 583 S.W.2d 603 (Tenn.1979).

The closing arguments of the defense and the State at the suppression hearing were not transcribed, so we cannot tell what grounds the defense pressed at that point. We must base our discussion solely upon what appears in the transcript. The evidence at the hearing was directed toward establishing the timing of events and the visibility of blood on Melson's clothing. Defense counsel commented that these facts were shown in her memorandum, but counsel wanted the court to hear from the wit-

nesses themselves. The court expressly stated his conclusion that the defense was basing its entire challenge on the ground that the affidavit and warrant misstated the true facts. Defense counsel agreed that the court's conclusion was correct. Consequently, this was the only ground addressed by the court in overruling the motion to suppress the warrant.

Assuming arguments that the warrant is in the record, the "reckless misrepresentation" ground should be the only one which we review. However, we shall address the other issues raised in this appeal. (The State did not include in its brief any argument upon the merits of this issue, relying entirely upon its assertion that the warrant is not properly in the record and thus not reviewable.)

Reckless Misrepresentations in Affidavit

[7] Defendant attacks the validity of the search warrant by asserting that the affidavit on the basis of which the warrant was issued contained reckless misrepresentations of material facts. Under *State v. Little*, 560 S.W.2d 403 (Tenn.1978), this is one ground upon which a warrant may be invalidated.

[8] The trial court in this case, at the close of the suppression hearing, specifically found that there had been no false statements either intentionally or recklessly made by the affiant. We do not find that the evidence preponderates against the court's holding.

Defendant argues that the affidavit states that he left Henry Shanklin at around 2:00 and returned in about half an hour. He says, however, that the combined testimony of Shanklin and Mary Jones, who sold him the beer, showed that he left Shanklin at about 2:45. There is no indication that the officers had talked to Mary Jones at the time the affidavit was given. As to Mr. Shanklin, he had no clock, was very vague about telling time, and only a limited version of the facts was available at the time of the affidavit.

The second allegedly reckless statement was made by "a reliable source" who said

that Melson was seen in his truck immediately before the estimated time of death. This reliable source is admitted by defendant to be Mattie Lewis, the Lawrences' maid. She had locked herself out of the house and was sitting outside when Melson drove up in his truck. She hailed him to ask if he had a key, and he angrily mentioned his argument with Mrs. Lawrence that morning. Mrs. Lewis did later see Mrs. Lawrence alive. (Mrs. Lewis testified at trial that she had seen Melson and someone else in Melson's truck after Mrs. Lawrence had driven her to where her car was parked. It is unclear whether the authorities knew this when the warrant was obtained.) In any case, the word "immediately" may have been less precise than, for example, "shortly" or "a little while." Since the trial court held that any impression did not amount to a false statement recklessly made, we shall resolve the issue in favor of his holding. To do otherwise would be to make overly fine distinctions.

Time Reference for Facts Stated

[9] References to time in the affidavit supporting the search warrant relate to information received within the previous twenty-four hours, that is, on April 10, 1980. Defendant argues that although the affiant received the information at such time, the facts which comprised such information could have taken place at any time.

It is clear from the affidavit that Melson told Shanklin on April 10 that he was in "a heap of trouble," because "Miss Ruby" had caught him stealing gasoline, and that he had to tend to some business. Thus, the only references which are arguably uncertain are when Barbara Lawrence and Melson had had the argument about stealing gasoline, and when Kimba Lawrence learned from Barbara of the argument. This is not sufficient to invalidate the search warrant, because it is clear that the incident was present in Melson's mind near the time of the murder, based upon what he told Shanklin. We hold that the affidavit is question

establish[ed] a time during which the illegal activity occurred so as to make it

appear to the magistrate that the illegal occurrence is not too remote to establish probable cause at the time of the application for [the] search warrant.... [T]here is no rigid rule or specific language required to establish the time element.

State v. McCormick, 584 S.W.2d 821, 824 (Tenn. Cr.App. 1979).

Specificity of Description of Property to be Seized

[10] The description in the warrant of the property to be searched for and seized is, "a blunt object, knife, or object capable of being used to strike, stab, cut, penetrate, and other paraphernalia pertaining to this incident," contained in the described vehicle. Defendant argues that this description is not sufficiently specific and thus authorizes a general search. He emphasizes the words, "any other paraphernalia," while ignoring the modifying and limiting words, "pertaining to this incident." The objects removed from the truck were: a ball peen hammer, a crescent wrench, a shirt, a couple of rags, a piece of rug and a syringe.

The authorities could not know precisely what evidence pertaining to the Lawrence murder would be in the truck until they searched it. Obviously, there could well have been evidence therein other than the potential murder weapon. Certainly, it would be reasonable to anticipate that there might be items which would appear to have blood on them, in view of the quantities of blood at the death scene and the blood spattered all over the garments in which the defendant was arrested. When Melson was arrested and read his rights, and then was asked why all the blood was on his clothing, he explained its presence by saying that he had been giving shots to some hogs. Melson's own statements made the syringe relevant.

We find that the cases cited by defendant, holding search warrants to be overbroad, are distinguishable from the case at bar. Rather, this case is analogous to fact situations such as those in *Andress v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 49

L.Ed.2d 627 (1976), and *Armstrong v. State*, 548 S.W.2d 334 (Tenn. Cr.App. 1976). In *Andress*, authorities seized files from offices of a lawyer they had probable cause to believe had committed fraud in a land transaction. The warrant in that case contained a long list of particular items, and then included the phrase, "together with other fruits, instrumentalities and evidence of crime at this [time] unknown." The Court held that this phrase must be read in the context of the description of items relating to the land transaction in question. The warrant thus did not authorize a general exploratory search but sufficiently limited the authority to search while giving the officers needed discretion.

In *Armstrong*, we do not have the language contained in the warrant, but there was a search of premises where a drug selling operation was allegedly being carried on. Defendant objected to the seizure of checks, bank documents, personal letters and drug paraphernalia because they were not described in the warrant. The Court of Criminal Appeals held that "[t]he relevance of the evidence seized is apparent. The identifying bank and personal documents were relevant in establishing proof of possession of the premises and ultimately of the drugs. The drug paraphernalia went to the proof that drugs were kept on the premises. All evidence was properly seized." 548 S.W.2d at 336.

We hold that this argument is without merit.

[11] Defendant makes another related argument: that the affidavit requests authority to search any box or container in the truck, but the warrant does not specifically include such box or container. It authorizes search of "the truck." However, the outside of the warrant—that which would show when the warrant was folded and served—says

STATE OF TENNESSEE

VS.

HUGH W. MELSON

1974 Green Ford Pickup Truck

License No. 7J480A and any containers and boxes found therein.

The conclusion is inescapable that the omission of "boxes and containers" from the warrant was merely inadvertent. The emphasis should be upon whether a "neutral and detached" magistrate could properly have found probable cause, which we hold elsewhere herein that he could. Obviously any boxes and containers were in the minds of the affiant and the magistrate. The affiant was not attempting to deceive anyone. A commonsense approach would dictate that the warrant was meant to authorize the search of the truck's contents. Also, we repeat that no evidence was presented on this point at the suppression hearing. We hold that this argument is without merit.

Basis in Affidavit for Crediting Hearsay Evidence Contained Therein

The warrant to search Nelson's truck was issued upon the affidavit of Lt. James Jowers of the Madison County Sheriff's Department. The sources of the information contained in the affidavit are as follows: Kimlin R. Lawrence, daughter-in-law of Mrs. Lawrence; Jon Lawrence, the victim's son; the affiant's personal observation; Henry Lee Shanklin, a retired farm employee of the victim's husband; the Assistant County Medical Examiner; and "a reliable source."

[12] Nelson argues that, although hearsay may provide the basis for a finding of probable cause upon which to issue a search warrant, the affidavit must also contain a substantial basis for crediting the hearsay. He contends that there is nothing in the affidavit to show that the above-listed sources of information were credible or that the information was reliable. Nelson cites the line of cases including, chronologically, *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); and *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971).

Nelson's reliance upon this line of cases is misplaced. A clear distinction has devel-

oped between the type of informant whose information was used therein, and the type of informant referred to in Lt. Jowers' affidavit. What we have in the present case is the so-called "citizen-informant," or "informant not from the criminal milieu." The reliability of such informants and the information which they provide are judged by a different standard than that of the typical criminal informant or "tipster."

Many federal and state courts have recognized the inherent difference between the two types of informants. As the Fifth Circuit Court of Appeals noted in *United States v. Hall*, 457 F.2d 1231 (5th Cir. 1972):

The rationale behind requiring a showing of credibility and reliability is to prevent searches based upon an unknown informant's tip that may not reflect anything more than idle rumor or irresponsible conjecture. Thus, without the establishment of the probability of reliability, a "neutral and detached magistrate" could not adequately assess the probative value of the tip in exercising his judgment as to the existence of probable cause. Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, and this circumstance could also affect their credibility. None of these considerations is present in the eyewitness situation such as was present here. Such observers are seldom involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they have either been the victims of the crime or have otherwise seen some portion of it. A "neutral and detached magistrate" could adequately assess the probative value of an eyewitness's information because, if it is reasonable and accepted as true, the magistrate must believe that it is based upon first-hand knowledge. Thus we conclude that *Aguilar* and *Spinelli* requirements are limited to the [criminal] informant situation only.

Id. at 1238-1239.

It was held in *United States v. Rollins*, 522 F.2d 160 (2nd Cir. 1975), cert. denied, 424 U.S. 918, 96 S.Ct. 1122, 47 L.Ed.2d 324

(1976), that the fact that information given by the informant is based upon his personal observation is a reliable basis for his conclusion that his statements are true. The case also addressed the defendant's arguments that the affidavit therein "fails to meet the second requirement of *Aguilar* that there be some showing of the trustworthiness of the informant himself," 522 F.2d at 164. Some of the court's statements in holding this argument without merit were:

We have previously recognized that the language in *Aguilar* and *Spinelli* was addressed to the problem of professional informers, [citation]. In this case, Williams was not an anonymous paid informer, but an identified bystander with no apparent motive to falsify. The report of such a person has a "peculiar likelihood of accuracy" Specific allegations of reliability or past reliable contact are not required when the informant in question was an eyewitness to the crime. [Citations].

Id.

Even in cases of unnamed paid informants, the court noted,

we have not required a recitation that an informant shall have previously supplied accurate information, but have merely held that such a recitation would be sufficient to justify reliance on the informant's story [citations]. "Such a recital . . . is only one way of validating hearsay used to obtain a search warrant—not a ritual that must be invariably observed even when the circumstances render it inappropriate." [Citation.] The principle to be applied is that the magistrate must have a "'substantial basis' for crediting the hearsay." [Citations]. In this case, Williams' information was based upon his personal observation and furnished adequate detail to meet this criterion. Moreover, the information provided by Williams was amply corroborated. . . . We reject appellant's contention that corroboration must directly link the suspect to the commission of the crime.

"An untested informant's story may be corroborated by other facts that be-

come known to the affiant, even if they corroborate only innocent aspects of the story."

Id. at 164-165.

The search warrant challenged in *United States v. Unger*, 469 F.2d 1263 (7th Cir. 1972), cert. denied, 411 U.S. 920, 93 S.Ct. 1546, 36 L.Ed.2d 313 (1973), did not specifically allege the reliability of the informant, a citizen who had done work on defendant's premises. However, the court held that the affidavit contained specific statements of fact.

The allegations of the complainant are not self-serving nor does it appear that the accusations by the citizen were reported to the police merely to spite defendant Unger. The Complaint emphasizes the very circumstances from which the magistrate herein could determine that the information given by the citizen was "credible" or the informant was "reliable".

469 F.2d at 1286-1287. Thus, "the internal content of the affidavit intrinsically prove[d] the truth of the . . . citizen's word," *id.* at 1286, citing *United States v. Roman*, 451 F.2d 579, 581 (4th Cir. 1971) (emphasis added).

In *United States v. McCoy*, 478 F.2d 176 (10th Cir.), cert. denied, 414 U.S. 826, 94 S.Ct. 53, 38 L.Ed.2d 62 (1973), defendant was convicted of skyjacking and challenged a search warrant which had been issued based upon information given to the FBI by, e.g., a passenger and a stewardess from the aircraft, and a former acquaintance of defendant. In holding the warrant valid, after discussing the distinction between citizen informants and criminal informants, the court concluded,

Without belaboring what we deem to be quite obvious, the affidavit of [the FBI agent] in the instant case was amply sufficient to permit the magistrate to exercise his independent judgment as to the reliability of the various sources of information. Indeed, on the basis of the affidavit before him, the magistrate could only have concluded that probable cause

did exist for the issuance of a search warrant.

Id. at 179.

The Supreme Court of Colorado held in *People v. Hubbard*, 184 Colo. 225, 519 P.2d 951 (1974) that when the source of information is an identified citizen-witness, "the information is presumed to be reliable, and prosecution is not required to establish either the credibility of the informant or the reliability of his information. [Citations]" 519 P.2d at 953.

An often-cited case distinguishing the citizen informer from the "traditional police informer" is *State v. Paszek*, 80 Wn.2d 619, 184 N.W.2d 836 (1971), wherein the court held that the "reliability of such a person [citizen-witness informer] should be evaluated from the nature of his report, his opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." 184 N.W.2d at 843.

[13] A sub-issue which must be discussed is whether or not the citizen informant must be named in the affidavit, since the nexus in the present case between Melson's truck and the murder of Mrs. Lawrence was provided by a person referred to in the affidavit as "a reliable source." We have no difficulty in holding that the name of the source is not required, as a matter of law, to be disclosed in the affidavit. The reliability of the source and the information must be judged from all of the circumstances and from the entirety of the affidavit. The name of the source is only one factor to be considered.

The United States Supreme Court held in *United States v. Harris*, 408 U.S. 573, 584-585, 91 S.Ct. 2075, 3082-83, 39 L.Ed.2d 723 (1971),

It will not do to say that warrants may not issue on uncorroborated hearsay. This only avoids the issue of whether there is reason for crediting the out-of-court statement. Nor is it especially significant that neither the name nor the

person of the informant was produced before the magistrate. The police themselves almost certainly knew his name, [and] the truth of the affidavit is not in issue.¹

A search warrant was issued based upon information from several sources in *United States v. McVey*, 596 F.2d 492 (1st Cir. 1979). The crime was the bombing of a tavern, and one of the sources was "an unknown male" who "stated that a white Cadillac had left the scene moments before the explosion." *Id.* at 494. The defendant argued that the "unknown male's" statement should not be credited because his credibility and the information's reliability had not been demonstrated under *Aguilar* and *Spinelli*. We shall quote the court's observations because they are so closely analogous to the case at bar.

We do not, however, regard the "unknown male's" statement as an informant's tip subject to *Aguilar* and *Spinelli*. We view it instead as the statement of a bystander witness. While the affidavit does not expressly disclose the source of the "unknown male's" information, the nature of the information he provided and the circumstances of his "on the scene" report could strongly suggest to the issuing judge that he was relating what he had personally observed. And, his statement was not at all in the nature of an informant's tip—it was non-accusatory and did not describe criminal activity. He merely stated . . . a detail innocuous by itself. Its significance lay in its fitting in with other facts which such a bystander would presumably not know. To be sure, it would have been preferable for the affidavit to have identified the "unknown male" and to have specified whether he had personally observed the Cadillac leave the scene. But we must interpret the affidavit "in a commonsense and realistic fashion," eschewing "[a] grudging or negative attitude" and recognizing that affidavits for search warrants are normally drafted by non-

proof of credibility and reliability was required than in the case at bar and others like it.

1. *Harris*, of course, involved an informant from the criminal milieu. Thus, a higher standard of

lawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 694 (1965). From that perspective, the reasonable implication of the affidavit is that the "unknown male" was a bystander witness, not an informant. Treating him as such—and taking into account that the statement, which formed a single link in a circumstantial chain, was non-accusatory—we think the demonstration of credibility and reliability that would be required under *Aguilar* and *Spinelli* in the case of an informant is not required here.

Id. at 497.

A similar case was *State v. Huff*, 220 Kan. 162, 551 P.2d 890 (1976), wherein defendant had been convicted of aggravated robbery of a store. After officers had obtained descriptions of the four robbers from store employees, and were searching the area in patrol cars, "an individual" ran up to them and described four people whom he had seen running into a building. The defendant challenged his arrest, but the court held that the information from the "individual" coupled with the other facts which were known to the officers, gave them probable cause to arrest defendant. The court noted that the individual did not relate facts pertaining to the crime, but only to four people who, it turned out, matched the descriptions of the robbers. "There is nothing in the record suggesting that it was unreasonable for Officer Baker to believe the individual other than the mere fact he was unknown." 551 P.2d at 884 (emphasis added). This was not a reason to disbelieve the information.

Accord, *State v. Kurland*, 130 N.J. Super. 110, 325 A.2d 714 (1974).

[14,15] The foregoing discussion sets forth the standards by which we must review the affidavit supporting the warrant for the search of Nelson's truck. We would only add the general propositions that affidavits must be looked at and read in a commonsensical and practical manner, *United States v. Harris*, *supra*; *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13

L.Ed.2d 694 (1965); *State v. Kurland*, *supra*; et al., and that the finding of probable cause by the issuing magistrate is entitled to great deference, *United States v. Melvin*, *supra*, 596 F.2d at 498, citing *United States v. Ventresca*, *supra*; *United States v. Unger*, *supra*, 469 F.2d at 1296, citing *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *State v. Kurland*, *supra*.

[16] We hold that the affidavit in this case contains sufficient statements upon which the issuing magistrate properly found probable cause. Each citizen informant provided a piece of information to the affiant innocuous in itself, but which fit with the other pieces of information in a way which linked Hugh Nelson and his truck to the killing of Barbara Lawrence. The averments in the affidavit came from several sources, unlike many cases where probable cause can be established from only one informant. The statement from the "reliable source" is self-verifying, in that it contains nothing speculative. The source clearly knew who Nelson was; knew that the truck was Nelson's; and knew that the place where it was seen was the Lawrence residence. Such information could only have come from someone who belonged in that immediate area—a neighbor, employee, or relative. In fact, it is conceded that the "source" was Mattie Lewis, the Lawrences' maid, who testified at the preliminary hearing and trial. There is no indication in the affidavit of a deliberate attempt to keep the "source" anonymous; she was simply not named.

Each case must be looked at under its own facts, and the existence of probable cause must be reviewed under all the circumstances. The combination of circumstances present as outlined in Lt. Jowers' affidavit supports the magistrate's finding of probable cause.

Having thus held, we cannot help admonishing law enforcement officials that this affidavit falls far short of the ideal. It should by no means be considered a model for those who must draft affidavits in the

future. "The affidavit in this case obviously was poorly drawn.... Moreover, there would appear to be no reason why the identity of the informants should not have been disclosed." *State v. Kurland*, *supra*, 325 A.2d at 716.

On the other hand, defense counsel did not pursue the reliability and credibility issue at the suppression hearing. As noted above, the court interpreted the entire thrust of the defense's argument as being that the affidavit had contained misrepresentations intentionally or recklessly made. Counsel acknowledged this interpretation as being correct. There was no exploration of the facts surrounding the issuance of the warrant. *United States v. Wilson*, 479 F.2d 936, 939 (7th Cir. 1973). We make this statement, although it is not the basis for our holding, since the affidavit is sufficient, as a matter of law, on its face.

BAIL

Melson was held without bail after his arrest, pending action of the county grand jury. The grand jury indicted him for first degree murder on May 5, 1980. On May 12, defendant filed the first of the motions from which he now appeals—a Motion to Set Bail. Defendant's brief recites, but the record in no way reflects, that a hearing was held on the Motion on May 16, as a result of which bail was set at \$200,000.

The next item in the record relating to bail is a Motion for Reduced Bail, filed September 26, 1980. Again, Melson's brief states, but the record does not reflect, that the court heard the motion on October 8 and declined to reduce bail. Defendant here argues that the setting of bond at \$200,000 amounted to "excessive bail" in violation of the Eighth Amendment of the United States Constitution and Art. 1, §§ 15 and 16 of the Tennessee Constitution. The State again relies on the fact that the record contains no transcripts of the bond hearings and argues that the matter is not reviewable. *Wiley v. State*, 563 S.W.2d 410, 413 (Tenn.Cr.App.1977).

[17] While it is true that there is very little in the record for us to review, we

would point out that under Art. 1, § 15 of our Constitution, bail may be denied altogether in a capital case "when the proof is evident, or the presumption great." This provision was the basis of the State's argument, at the preliminary hearing, that bail should be denied, and in fact it was denied. The trial court has very wide latitude in setting bail, and we are most reluctant to second-guess the court in this case. Even if the amount set was more than Melson was in fact able to raise, there is no showing that the court's purpose in setting such amount was to prevent Melson from gaining his freedom rather than properly to assure that he would appear in court.

[18] TRAP 8, which governs review of trial court orders affecting release conditions both before and after conviction, was in effect at the time of the proceedings in question, and prior to that, TCA § 40-1204 had dealt with appeal of pre-conviction release orders. Melson's only effective remedy for the setting of bail at \$200,000 would have been to follow Rule 8 promptly after bail was set—not to wait until after conviction. His case could have been ruled on before he spent months in jail. He gains nothing by appealing the amount of bail at this point. There is no ground for holding that the amount at which bail was set, even if it were excessive, more probably than not affected the outcome of the case. The appeal of this issue at this point is of no practical effect or benefit to the defendant.

PARTICIPATION BY DEFENDANT AT TRIAL

On October 6, 1980, Melson's counsel filed a Motion to Allow Defendant to Participate at Trial. There is no indication that this Motion was argued, or what entered into the court's apparent decision to overrule it. The grounds for the Motion were: (1) It was evident that the trial would be lengthy and complex. (2) A defendant has the right under the Sixth Amendment of the United States Constitution and Art. 1, § 9 of the Tennessee Constitution, to "participate fully in his own defense." (3) This "right has

been recognized by this Court in *State v. Burkhart*, 541 S.W.2d 365 (Tenn.1976)." (4) That the conditions outlined in *Burkhart* for participation by Melson *in propria persona* as well as by counsel had been met.

[19] The right of a defendant to participate in his own defense is an alternative one. That is, one has a right either to be represented by counsel or to represent himself, to conduct his own defense. *Burkhart*, *supra*, and cases cited therein. It is entirely a matter of grace for a defendant to represent himself and have counsel, and such privilege should be granted by the trial court only in exceptional circumstances.

[20, 21] The mere facts that a defendant is not seeking to disrupt the trial proceedings and that he may be intelligent do not require a trial judge to allow a defendant represented by counsel to participate. These are only threshold considerations. Further, we do not find that the length of a trial or the involvement of the death penalty constitute "exceptional circumstances." These factors are present far too often to be "exceptional." If hybrid representation were to be allowed in every lengthy and/or capital case, then by definition it could not be granted "sparingly and with caution." *Burkhart*, 541 S.W.2d at 371. We shall not set forth what would constitute exceptional circumstances.

Melson was represented by two very competent attorneys, and there is no indication that he did not have the opportunity to consult with them or give them his views. There is no evidence to support the defendant's contention that the trial judge abused his discretion in failing to allow him to participate at his trial. We certainly do not feel that denial of this Motion more probably than not affected the outcome of the case, TRAP 36(b).

CONTINUANCE

[22] A week before the scheduled trial date, Melson filed a Motion for a Continuance, supported by an affidavit. The trial court apparently overruled the motion, and defendant appeals. The record contains

nothing on the basis of which we could find error. There is no transcript of any hearing; two letters referred to in counsel's affidavit as being forthcoming are absent; there is no showing that defense counsel could not have obtained the evidence and assistance referred to in the motion sooner than she did. One ground for the motion was the fact that the defense had not received a report of the mental examinations conducted at the Middle Tennessee Mental Health Institute. However, the court allowed the psychological evaluator from the Institute to testify over the State's objection, as a witness for the defense. His testimony was highly favorable to Melson.

Continuances are not customarily granted merely as a matter of course, and we cannot reverse the verdict in this case where it cannot be clearly shown that the trial court abused his discretion in denying the continuance.

VENUE

On May 23, 1990, Melson moved for a change of venue. Attached to the motion were newspaper articles and transcripts of broadcasts about the event, along with affidavits from individuals asserting that Melson could not receive a fair trial in Madison County. The State asserted that a fair trial could be had, submitting its own affidavits. A hearing, not transcribed, was held on May 30, at which the court overruled the motion. On June 25, the court ordered everyone involved for the State and the defense, not to make, issue or disseminate any extrajudicial statements concerning the litigation.

In our opinion, the trial court ruled correctly. The pretrial publicity occurred between the death and the indictment, as stated above. The publicity died down after the indictment in mid-May, and the trial was not held until mid-October. All of the reportage was factual in nature, except for one editorial from each Jackson paper. These were restricted to the sad event of Mrs. Lawrence's death, and did not deal with the suspect, the investigation, the weapon, or anything else concerning de-

defendant. None of the news articles or transcripts was sensational, improper, or in poor taste. A statement by one of the attorneys general, the publication of which is complained of by defendant, is a quotation from his argument to the court at the preliminary hearing, concerning whether or not bail should be set.

We turn to voir dire, and relate the following facts to place it in perspective. The voir dire took a day and a half; fifty veniremen were examined for the regular panel and seven for the selection of the one alternate. The court excused for cause fifteen veniremen for the regular panel and four for the alternate. Of these, six stated that they would automatically vote against the death penalty. One alternate venireman was excused because he had heard mentioned in the waiting room something about the questions being asked on voir dire. Six veniremen personally knew the family and six others had already formed an opinion in the matter.

Of the twenty jurors against whom defendant's brief specifically alleges bias due to publicity, ten were among those excused for cause. Since the venire was not exhausted when voir dire ceased, defendant was not prejudiced by the exclusion of these veniremen as possible jurors.

The defense, which had sixteen challenges to the State's eight, did not exhaust its peremptory challenges early in the voir dire. Three peremptory challenges were exercised on selection of the alternate.

Eight veniremen had indeed heard nothing about the crime. Five were peremptorily challenged and three sat on the jury. One of the latter was specifically mentioned in the defendant's brief as being biased because she had gone to school with the victim. This had been in the 1940's, and they had had no contact since then. Further, this juror had taught Melson's daughter; and one defense attorney was a close friend of someone who we infer was the juror's daughter.

Defendant points to nine other veniremen as having been biased by publicity. Three sat on the jury. They remembered some

general facts about the case, but their answers to voir dire affirmatively showed lack of bias. The remaining six veniremen were peremptorily challenged. These had perhaps more specific recollections of the facts of the crime, or described their feelings about it as being shock or horror. However, these people also expressed their ability to be fair, to hear the case impartially; and stated that they had formed no opinion as to the guilt of Melson himself.

[23] In reviewing the law governing change of venue, we first note that under T.R.C.P. 21, the decision of whether or not to change the venue is for the sound discretion of the trial court and may not be reversed on appeal absent a clear abuse of such discretion. *Rippy v. State*, 550 S.W.2d 636, 638 (Tenn. 1977); *State v. Hoover*, 594 S.W.2d 743 (Tenn. Cr. App. 1979); *Seelbach v. State*, 572 S.W.2d 267 (Tenn. Cr. App. 1978); *Adams v. State*, 563 S.W.2d 804 (Tenn. Cr. App. 1978); and cases cited therein.

[24] The pretrial publicity in this case has been described above and cannot possibly be compared in intensity, extent or sensationalism to that outlined in, for example, *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Irsin v. Dowd*, 366 U.S. 717, 725-727, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); and *Adams v. State*, *supra*. By comparison, the coverage of this case in the Jackson media and one Memphis newspaper was a model of dignity and restraint. The affidavits submitted by defendant as exhibits to the Motion for Change of Venue, although there were many, were all alike and simply contained the conclusory statement that because of extensive publicity, Melson could not obtain a fair trial in the county.

The United States Supreme Court held in *Rideau*, *supra*, that, under the facts therein, it was not necessary to examine the voir dire to determine that a fair trial was impossible in the parish in question. In that case, there had been televised three times on a local station an interrogation between the sheriff and the defendant containing a detailed confession to the crimes charged

(armed robbery, kidnapping and murder). In cases such as that before us, however, it has always been held necessary to determine whether or not the jury which was actually impaneled showed bias and prejudice against the defendant. "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside...." *Irvin v. Dowd*, *supra*, 366 U.S. at 723, 81 S.Ct. at 1643 (citations omitted). See *Dobbert v. Florida*, 432 U.S. 282, 302, 97 S.Ct. 2260, 53 L.Ed.2d 344 (1977); *Adams v. State*, *supra*, 563 S.W.2d at 806.

Several courts have adopted the words of the United States Supreme Court in *Murphy v. Florida*, 421 U.S. 794, 799-800, 95 S.Ct. 2031, 2035 36, 44 L.Ed.2d 589 (1975):

"Qualified jurors need not, however, be totally ignorant of the facts and issues involved.

"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." ... quoting from *Irvin v. Dowd*, 366 U.S. 717, 723, 6 L.Ed.2d 751, 81 S.Ct. 1639 [1642] (1961).

Dobbert v. Florida, *supra*, 432 U.S. at 302, 97 S.Ct. at 2303; *Adams v. State*, *supra*, 563 S.W.2d at 807. As the Court in *Dobbert* went on to say,

Petitioner's argument that the extensive coverage by the media denied him a fair trial rests almost entirely upon the quantum of publicity which the events received. He has directed us to no specific portions of the record, in particular the voir dire examination of the jurors, which would require a finding of constitutional unfairness as to the method of jury selection or as to the character of the jurors actually selected. But under *Murphy*, extensive knowledge in the community of

either the crimes or the putative criminal is not sufficient by itself to render a trial constitutionally unfair. Petitioner in this case has simply shown that the community was made well aware of the charges against him and asks us on that basis to presume unfairness of constitutional magnitude at his trial. This we will not do in the absence of a "trial atmosphere ... utterly corrupted by press coverage," *Murphy v. Florida*, *supra*, [432 U.S.] at 798 [95 S.Ct. at 2335]. One who is reasonably suspected of [in *Dobbert*] murdering his children cannot expect to remain anonymous. Petitioner has failed to convince us that under the "totality of circumstances," *Murphy*, *supra*, the Florida Supreme Court was wrong in finding no constitutional violation with respect to the pretrial publicity.

432 U.S. at 303, 97 S.Ct. at 2335.

In *State v. Hoover*, *supra*, 594 S.W.2d at 746, there was listed a group of seventeen factors to be considered in determining whether to grant a change of venue. We shall relate several of these to the facts of this case in support of our holding that the trial court did not abuse its discretion in denying a change of venue to Nelson. The publicity was factual, fair, and took place only through the time of the indictment. Five additional months elapsed before the trial. There was a great deal of care exercised in jury selection. Of the panel finally selected, a few knew nothing about the crime, and those who did had only heard of it at the time it happened, without paying particularly close attention. No one had formed an opinion, and all had an open mind and stated clearly that they could give Nelson an impartial trial. (Even those who were peremptorily challenged, who mentioned something in passing about "seeing the criminal on television" or having heard that "she was killed by someone who had been employed by her husband," stated without hesitation that they could lay aside whatever they had heard and try the defendant fairly based only upon the evidence presented in court.) The court willingly excused for cause anyone who had, or appeared to have, formed an opinion. Nelson

did not exhaust his peremptory challenges until very late in the voir dire. Although law enforcement and prosecution personnel were quoted in the press, it does not appear that anything inflammatory was said, and it appears that everyone complied with the court's June order prohibiting extrajudicial discussion of the case. The defense's affidavits in support of its motion were conclusory only, and it does not appear that there were any threats or demonstrations against Melson. Madison County is one of the more populous areas of the state, enhancing the likelihood of obtaining a jury untainted by fatal bias even if its members did have an awareness of the case.

We have no difficulty in holding that there was no error in the court's dismissal of the Motion for Change of Venue.

JURY SELECTION

In addition to the above treatment of the voir dire process, we shall respond to three other issues raised by Melson concerning the jury selection process.

[25] Melson filed a motion before trial for individual voir dire and sequestration during voir dire. The court allowed this for questions regarding the effect of publicity and the veniremen's views on the death penalty. Thus, the only portion of voir dire conducted in panels was that relating to employment, family, health, outside activities, etc. Defendant's rights were amply protected by conducting the voir dire in this manner.

Defendant also filed a motion to prevent disqualification of jurors who were opposed to the death penalty and would automatically vote against it. He argued that to exclude such jurors would violate his constitutional rights to an impartial trial and to equal protection; that persons opposed to capital punishment are an identifiable group in society and as such should be represented on the jury if the trial is to be fair.

[26, 27] We have considered the cases relied upon by Melson and hold as we did in *Houston v. State*, 508 S.W.2d 287 (Tenn. 1979) that this issue is without merit. As

we pointed out in *Houston*, not only the defendant, but also the State, is entitled to a fair and impartial trial. *Id.* at 272. "A juror who cannot follow the law and instruction of the trial judge on capital punishment is not impartial to the state. [Citations omitted.]" *Id.* A defendant's interests are quite sufficiently represented on the jury by the presence of jurors who are reluctant to impose the death penalty; such jurors essentially represent the same cross-section of society as would jurors who would automatically vote against it. Such jurors will see that it is not capriciously imposed. The function of the jury is not to make the law, but conscientiously to carry out the law as it is given to them by the court and to apply it fairly to the facts of the case.

[28] Melson's third assertion is that the jury was tainted by discussion of the case in the venire waiting room. As we have noted, jury selection took over a day. At the end of the first day, tentatively selected jurors were sequestered for the night. On the second day, the first twelve tentatively selected jurors were questioned by one defense counsel as to whether anything whatsoever had happened which would in any way affect them. He questioned at length, phrasing his questions as broadly as possible. We must accept what the record reflects, and hold that the jury was not tainted up to that point.

After that, one of the first twelve was peremptorily challenged and more veniremen were called in. One was excused for cause, one was challenged, and a third became the twelfth juror. As to the alternates, two veniremen were excused for opposition to the death penalty. A third was peremptorily challenged, but her voir dire on the death penalty was uneventful. The next person became alternate juror number 1.

There followed some discussion at the bench, when defense counsel remarked that the third candidate for alternate, who had been peremptorily challenged, "attempted to tell jurors on the second floor what questions were being asked. She was asked by

the prospective jurors downstairs. I believe a Sheriff's Deputy stopped her, but there is a lot of conversation going on about the questions [and] the Court might want to question the next alternate about that." The deputy who had been present said that he had not heard that juror say anything. The court determined to ask jurors if anybody had talked to them.

Two more veniremen were excused, one peremptorily and one for cause, without being asked by the defense whether they had heard discussions about the voir dire. The next venireman was questioned about other things and the defense indicated that it was finished questioning, when the State asked for a bench conference. The court then asked whether, while the venireman had been waiting downstairs, anyone had discussed in his presence what was being asked in this court. The juror responded that some questions about capital punishment were being discussed. It had simply been stated that capital punishment was being asked about in the voir dire, and that "some of them said they were against it and that's why they were being relieved." Defense counsel wanted to know whether it had been discussed on the previous day or only on that day, because she had just heard a rumor that people had talked "last night" about what their answers would be. However, the venireman had only heard talk that day. The court then said to defense counsel, "Unless you have some specific incident, that closes it." Defense counsel did not object further; that venireman was excused and the court did not carry on any further voir dire.

We are of the opinion that the court in no way abused his discretion in the manner in which he dealt with this situation. The fact that capital punishment was being asked about and that people who were against it were being excused, probably came as no surprise to the jurors. We do not feel that it is so likely that jurors' answers were prejudiced that the court abused his discretion. See *State v. Grimes*, 615 S.W.2d 142, 148 (Tenn. 1981). Again, as we noted in our discussion of the change of venue argument, a defendant cannot expect to obtain a

jury who has never heard of him or the case until they are actually impaneled.

ERROR IN ADMITTING CERTAIN EVIDENCE

[29] One of the issues raised by Melson is that the court erred in declaring Herbert L. MacDonnell an expert witness and admitting his testimony. However, the defense not only failed to object to the court's ruling qualifying him, but also it conducted no cross-examination of him during the qualification process. As the Court of Criminal Appeals held in *Bryant v. State*, 549 S.W.2d 956, 957 (Tenn. Cr. App. 1977), "we could not consider this assignment even if it had merit."

[30] What the defense did do was move after Mr. MacDonnell's direct and cross examination to strike his entire testimony "based on the last statement that he made." This was that he was not aware of the courts of Tennessee having accepted the principles on which blood stain pattern interpretation had been based, as being a recognized subject for expert testimony. The area in which Mr. MacDonnell's expert testimony was sought was basically to explain the pattern of blood stains which were spread over Melson's shirt and pants, from top to bottom, as well as to some extent on his cap and boots.

The defense's objection appears to be to the recognition of this area of expertise in Tennessee, rather than to his education, background, etc. His background and experience were formidable. He had participated in the investigations of many crimes, published many writings, conducted numerous seminars, and done research over a long period of years in forensic science in general and, in particular, the principles of physics as applied to blood patterns. He had testified in many state and federal courts, including a 1974 hearing in Memphis concerning James Earl Ray.

The defense argues that none of Mr. MacDonnell's experiments in blood pattern analysis had been carried out on humans, but only on animals. However, of course,

the crimes which he had investigated had involved humans. Further, he testified that "in physics it makes very little difference as to what the origin of the blood is—whether it is polyurethane soaked with blood or it is a human hand—it really doesn't matter. You transfer energy to blood hydrostatically and you get an eruption of blood spatters." The witness could tell the differences in the way in which blood would spatter depending upon how much force caused the blood to be shed.

The defense also urges that there is no such area of expertise as "blood stain patterns." However, although a field may be narrow, there may certainly be persons who are experts therein. Certainly there are fewer experts in, for example, nuclear physics than there are in fingerprint identification, but the narrowness of a field should not preclude the testimony of one who has proved his expertise therein to the satisfaction of the trial court in the reasonable exercise of his discretion. In any case, the witness testified that he had trained over 300 people in the area; and that there were others (including the defense's chosen expert) who were also training people. The subject has been written on as far back as 1894, and the witness knew of over a hundred reference works. As the witness said, "there are other people who testify [as blood pattern experts]. I am one of the few and I certainly wouldn't say that there are a large number, but there is an ever increasing number."

Mr. MacDonnell's testimony was clear, understandable, and accompanied by demonstrations to the jury. He obviously knew whereof he spoke, and we hold that he was clearly competent to give the testimony which he gave. Further, we repeat that the basis of defendant's objection could and should have been elicited before the witness was qualified as an expert. No error was committed.

[31] Defendant complains that the court allowed the testimony of one Dora Ingram, because her name was neither endorsed on the indictment nor (according to Melson's brief) furnished to the defendant pursuant

to its discovery request. The court allowed Mrs. Ingram to testify over Melson's objection because, as the State pointed out, her name had been called out numerous times during voir dire, three days earlier, as one of the State's witnesses.

We hold that the court was correct in overruling the defense's objection. The purpose of furnishing the names of witnesses is to prevent surprise. *Aldridge v. State*, 4 Tenn. Cr. App. 254, 470 S.W.2d 42 (1971); and the repeated mentioning of her name during voir dire prevented surprise when she was called. Further, her testimony contained nothing new or different which would have been damaging to Melson. She merely verified that a group of employees and their relatives was at the Shanklin house on the afternoon of the crime. Melson was not prejudiced by the admission of Mrs. Ingram's testimony. "The record contains nothing so much as intimating that [her] testimony . . . would have been otherwise if defense counsel had been able to interview and interrogate [her] before the trial." *Aldridge, supra*, 470 S.W.2d at 45.

[32] As to the admission of a series of photographs of the crime scene, Melson argues that their prejudicial effect far outweighed their probative value. Generally, the law has been that "the admissibility of photographs is a matter to be determined by the trial court in the exercise of its sound discretion." *Cagle v. State*, 507 S.W.2d 121, 132 (Tenn. Cr. App. 1973). "When photographs, gruesome in nature and likely to appeal to the emotions of the jury, are not probative of some contested factual issue they are not admissible. If probative, they are. [Citation]" *Hawkins v. State*, 554 S.W.2d 876, 878 (Tenn. Cr. App. 1977).

The leading Tennessee case on the subject is *State v. Banks*, 564 S.W.2d 947 (Tenn. 1978). In that case, one Smith was brutally murdered by blows from a blunt instrument, and a strong case was made against Banks based upon circumstantial evidence. In that case, the photos had been of the victim's head and body; and Banks had argued that they were not relevant to

any contested issue, but rather had the sole purpose of prejudicing the jury. The Court of Criminal Appeals found that the admission of the photos had been, essentially, reversible error.

[33] We acknowledged the rule of liberality in the admission of evidence, including photographs, placing broad discretion in the trial court. "Moreover, the trend of modern authority is to vest more discretion in the trial court in this respect." *Id.* at 949. One requirement is, of course, that the evidence be relevant to an issue in dispute. A second factor is that "even relevant evidence should not be admitted if its prejudicial effect outweighs its probative value."

The more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." *Id.* at 951.

[34] Melson argues that the photographs admitted here were not probative of a disputed issue, because he does not dispute the cause of Mrs. Lawrence's death. Thus, their prejudicial effect as a matter of law outweighs their probative value. He argues that the testimony of, for example, the pathologist and the coroner "adequately established and better explained" the cause of death.

The State has made the arguments that the photos did have probative value because the amount of blood and the conditions at the scene showed premeditation and deliberation; further, because the defense challenged on cross-examination the conclusion reached by the officers at the scene that the substance all over the room was blood; and further because the photos tied in with the testimony of Mr. MacDonnell as to how the blood got where it did (i.e., on the surfaces all around the room and on Melson's clothing). Of course, the admission of the photographs was discussed outside the presence of the jury, and the State indicated that it had other, more gruesome, pictures which it was not seeking to have placed into evidence.

Thus, the fact and cause of death were not the issues on which the State sought to

have these photographs admitted. We agree with the trial court that their admission was justified as relevant to the issues relied on by the State, and hold that there is no showing that the court abused his discretion in admitting them. Additionally, it certainly does not affirmatively appear that the "admission of the photographs has affected the results of the trial." *Hanks, supra*, at 953. See also, *United States v. Brady*, 595 F.2d 359, 361 (6th Cir. 1979).

[35] Two FBI Special Agents were allowed to testify, one as to his analysis of Melson's clothing and other items for blood thereon, and one as to his comparisons of hair samples found on the evidence with known hair samples taken from Melson and the victim. The substance of their testimony is related elsewhere in this opinion; here, we deal with Melson's contention that their testimony was too speculative to be admissible; that the prejudicial effect outweighed the probative value. Although he concedes that the two witnesses were experts, he asserts that there are three additional "prongs" of a test for admissibility of expert testimony, outlined in *United States v. Brady, supra*, following *United States v. Brown*, 557 F.2d 541 (6th Cir. 1977), which were not met here. Those three are: proper subject, conformity to a generally accepted explanatory theory, and probative value compared to prejudicial effect.

As to the blood samples, particularly on Melson's clothes and the ballpeen hammer, the testimony was highly relevant. Although no stain was large enough to test for blood type, the presence of human blood and the absence of hog blood were positively established. This disproved Melson's explanation given at the time of his arrest for the presence of blood on his clothing—that he had been giving shots to hogs. Also, if the blood had come from such source, there would be no reason for it to appear on the ballpeen hammer found in his truck.

As to the hair samples, the witness described how hair samples are compared and the twenty or so characteristics of each hair which are examined. It is true that two individuals may possibly have matching

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hair, unlike fingerprints, which are unique. The agent stated that in a Canadian study, and in his own experience, it had been found that the hair of two different people would match in one out of every 4,500 to 5,000 cases. Further, the other individual would have to have been in the same place at the same time as the individual being examined. Thus, it was extremely unlikely that a hair, found on Mrs. Lawrence's blouse and exactly matching Melson's hair, would have come from someone else's head. It was also highly unlikely that the hair embedded in blood on the ball peen hammer, which exactly matched Mrs. Lawrence's hair, would have come from anyone else. This likelihood was rendered even more remote by the fact that the hair on the hammer was broken off rather than having been pulled out of having fallen out, and thus could only have come out by the application of force.

We have no hesitation in holding that the testimony of the FBI agents clearly met all tests for admissibility. This holding is fully consistent with the holding in defendant's own case, *Brady, supra*.

TRIAL COURT'S REFUSAL TO GIVE REQUESTED INSTRUCTIONS IN SENTENCING PHASE

Before the sentencing phase of the trial, Melson's counsel requested five special instructions, which the court declined to give. Counsel did not object or except to this ruling, but asked that the request be included in the record, which implies an objection. The requested instructions, and our holding as to each, follows:

[36] 1 and 2. That the decision to afford an individual defendant mercy does not violate the Constitution. That in setting the punishment, the jury was to weigh the evidence in aggravation and mitigation, but was not to be influenced by passion, prejudice, or other arbitrary factor. Counsel cited *Gregg v. Georgia*, 438 U.S. 159, 96 S.Ct. 2509, 49 L.Ed.2d 859 (1978).

These were basically observations made by the Supreme Court in the course of the *Gregg* opinion, and do not explain or eluci-

date the Tennessee death penalty statute, TCA § 39-2-404. The Court of Criminal Appeals well explained why observations contained in appellate court opinions do not form a satisfactory basis for jury instructions in *Henderson v. State*, 539 S.W.2d 843, 847-849 (Tenn. Cr. App. 1976). Also, the idea that "mercy" could be extended to a defendant is incorporated in the instructions on mitigating factors, and the admonition against being ruled by passion or prejudice runs throughout. Thus, these requested instructions were reflected in the instructions actually given. *Edwards v. State*, 540 S.W.2d 641 (Tenn. 1976).

[37] 3 and 4. That the jury need not find any mitigating circumstance in order to return a life sentence; a life sentence may be returned regardless of the evidence. That in order to impose a death sentence, the jury must be unanimous; if the jury could not reach a unanimous decision, defendant would be sentenced to life imprisonment.

[38] These requested instructions simply are not correct statements of the law. If no aggravating circumstance is proved by the State beyond a reasonable doubt, then the jury must return a life sentence without having to consider mitigating circumstances. However, if the State does prove an aggravating circumstance beyond a reasonable doubt, then unless the jury finds that mitigation exists and outweighs the aggravating circumstance, it can only impose the death penalty.

As to the unanimity prong, TCA § 39-2-404 is clear that any jury imposed punishment must be unanimously reached. Thus, when the jury is considering its choice of punishment, it is only concerned with reaching a unanimous result, just as is any jury in the guilt or liability phase of a trial. This point was considered in *Houston v. State*, 501 S.W.2d 267 (Tenn. 1979), wherein we held, "The after-effect of a jury's deliberation is not a proper consideration for the jury." *Id.* at 278.

[39] 5. That in its deliberations, the jury was to presume that if it imposed a life sentence, Melson would spend the rest of his life in prison, and if it imposed a death sentence, Melson would be electrocuted, and the jury was to make no other presumption.

Again, this is not a full and fair reflection of what the jury was to consider, and dealt more with the effects of the verdict than with the verdict itself, *Houston, supra*. The law was correctly given to the jury in the court's charge, *Kilwanda, supra*.

CONSTITUTIONALITY OF DEATH PENALTY STATUTE

In addition to the above challenges to the trial court's refusal to give requested jury instructions, Melson challenges the constitutionality of the Tennessee death penalty statute, TCA § 39-2404. Most of the grounds advanced by Melson have been examined previously by this Court and found to be without merit.

[40, 41] He argues that one aggravating circumstance found by the jury (§ 39-2404(i)(5), the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind), is unconstitutionally vague and overbroad, a contention which we have rejected in *State v. Pritchett*, 621 S.W.2d 127 (Tenn.1981); *State v. Strouth*, 620 S.W.2d 467 (Tenn.1981); *State v. Grosselove*, 615 S.W.2d 142 (Tenn.1981); and *State v. Dicka*, 615 S.W.2d 136 (Tenn.1981). In *Strouth*, we stated that this aggravating circumstance should be interpreted to refer to a conscienceless or pitiless act which was unnecessarily torturous or evinced a depraved state of mind; that the torture inflicted must be heinous, atrocious or cruel. We agree that the killing of Barbara Lawrence met this test, despite Melson's argument that no torture occurred because Mrs. Lawrence died immediately. This theory is not plausible. First, the uncontradicted proof shows that Mrs. Lawrence had defensive injuries to her arms and hands, proving that there was time for her to realize what was happening, to feel fear, and to try to protect herself. Second,

a killing wherein the victim is struck up to thirty times, causing an entire room to be covered with a spray of flying blood, and causing the victim's brains to extrude through the gaping hole in her skull, evinces depravity of mind.

[42] He argues that the second aggravating circumstance found (§ 39-2404(i)(6), prevention of arrest or prosecution, does not apply to him. We find that the jury could have found that this factor was present beyond a reasonable doubt, since Mrs. Lawrence had threatened to expose his alleged theft of gasoline. He had told Henry Shanklin, "I'm in a heap of trouble," and he had told Mattie Lewis, "She can't tell Mr. Jack and have Mr. Jack coming back there raising hell with him."

[43, 44] Defendant argues that the death penalty is a disproportionately severe punishment, considering the crime and the defendant. Counsel compare this case with several others they urge prove their point. However, comparing this case with numerous others illustrates that imposition of the death penalty does not demonstrate that the jury was aberrant, arbitrary or capricious. Nor can we agree with Melson that the sentencing review process established under TCA § 39-2406 and Rule 12 (formerly Rule 47) of this Court is unconstitutionally inadequate to afford a meaningful proportionality review. *State v. Pritchett, supra*; *State v. Strouth, supra*; *State v. Coleman*, 619 S.W.2d 112 (Tenn.1981); *State v. Grosselove, supra*.

We have held that it is constitutional under TCA § 39-2404(h) not to inform the jury that if they fail to agree unanimously on punishment, the trial court will impose a life sentence. *State v. Simon*, 625 S.W.2d 498 (Tenn.1982); *State v. Harrington*, 627 S.W.2d 345 (Tenn.1981); *State v. Pritchett, supra*; *State v. Strouth, supra*; *Houston v. State*, 605 S.W.2d 267 (Tenn.1979).

[45] The presence of the exclusive list of possible aggravating circumstances set out in TCA § 39-2404(h) is adequate notice thereof to a defendant, without his being specifically notified by the State of the

particular ones upon which it is relying. *State v. Strouth, supra*; *State v. Grimesclose, supra*; *State v. Berry*, 502 S.W.2d 581 (Tenn.1980).

Melson's argument that the statute, TCA § 39-2404(f) and (g), fails to specify the burden of proof and standard of proof to be used in determining whether aggravating circumstances outweigh mitigating circumstances has previously been addressed, *State v. Johnson*, 632 S.W.2d 542 (Tenn. 1982); *State v. Coleman, supra*; *State v. Pritchett, supra*; *State v. Dicks, supra*; *State v. Houston, supra*.

[46] Melson argues that TCA § 39-2404(j) is unconstitutional in failing to require the jury to specify what mitigating circumstances have been considered and found to be absent and insufficient to outweigh the aggravating circumstances (which must have been found beyond a reasonable doubt to exist before the jury reaches the issue of mitigating circumstances). He argues that this shortcoming prevents adequate review by this Court under TCA § 39-2406(c)(3). We disagree.

The weighing of aggravation/mitigation by the jury is fraught with safeguards for a defendant. There are only certain aggravating circumstances which may be considered. These are spelled out in the statute and the jury is instructed that it may not consider any other factors. The State has the burden of proving beyond a reasonable doubt that one or more factors exist.

The statute lists mitigating circumstances which may be considered; but, in contrast to the list of aggravating circumstances, the jury is in no way limited to these factors. It may consider any other factors on its own initiative, and in fact the court in this case added several others in its instructions: Melson's honorable discharge from the Navy, his lack of significant history of prior criminal activity, and that he was a family man who was a peaceful and productive member of the community. There is no burden of proof as to mitigating factors; and the jury may find that any factor outweighs any aggravating circumstance. That is, the jury may attach great weight

or significance to any factor; it has a great deal of latitude. If a jury finds that aggravating circumstances are outweighed, there is nothing which the State can do to change the outcome, while an opposite finding is reviewable by this Court. Defendants may be assured that this Court will carry out the statutory requirement of TCA § 39-2406(c)(3) that "in reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found."

[47] Melson's last point is that TCA § 39-2404(d) denies him the right to present "final argument" to the jury at the sentencing phase. The statute provides for closing argument first by the State, then by the defendant, and last by the State. This is the same order of argument which exists in any proceeding, with the party having the burden of proof arguing first and last. Thus, this order is not inherently prejudicial to the defendant or favorable to the State in its use at the sentencing stage of a death penalty proceeding. None of the cases cited by defendant holds, or even implies, otherwise. In *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 563 (1975), the Supreme Court overturned a conviction which had taken place without a jury trial. The trial judge had exercised discretion allowed him under a New York statute and had disallowed any summation of the evidence on the part of the defendant. Such case is inapposite here. We hold that this issue is without merit.

[48] We hold that the Tennessee death penalty statute is constitutional; and upon our review under TCA § 39-2406, we hold that it was not applied arbitrarily, capriciously or with passion in this case.

The trial court's rulings on all issues raised herein, the verdict of the jury, and the imposition of the death penalty, are all affirmed. The date of execution is fixed for November 15, 1982, unless stayed or

otherwise ordered by this Court or other proper authority. Costs are assessed to appellant.

HARRISON, C. J., and FONES and COOPER, JJ., concur.

BROWN, J., dissents in part and concurs in part.

BROWN, Justice, concurring in part and dissenting in part.

For the reasons stated in my dissent in *State v. Dicks*, Tenn., 615 S.W.2d 126 (1981), I would hold that the death penalty is unconstitutional, but, I concur in all other respects.



Frances Annette PICKETT,
Plaintiff-Appellee,

v.

Braxton BROWN, Defendant-Appellant,

William M. Leech, Jr.,
Intervenor-Appellant.

Supreme Court of Tennessee.

Aug. 30, 1982.

Natural mother brought paternity action against alleged father, and the Attorney General was allowed to intervene on the issue of the constitutionality of the two-year statute of limitations. The Juvenile Court, Shelby County, Kenneth A. Turner, J., allowed the child to be added as a plaintiff and, after declaring the limitations statute to be unconstitutional, allowed an interlocutory appeal by certifying that the constitutionality of the statute was the sole determinative question of law in the proceedings. The Supreme Court, Drowota, J., held that: (1) statute requiring that a paternity action be instituted not more than

two years from the birth of the child unless paternity has been acknowledged by the father in writing or by the furnishing of support is not unconstitutional as denying substantial benefit to children born out of wedlock because children born in wedlock may sue their fathers for support throughout their minority, and (2) action which was brought by natural mother to establish paternity and obtain an order for support of a child born out of wedlock and which was brought more than two years after child's birth was barred by two year period of limitations when alleged father had never acknowledged child in writing or by furnishing support.

Reversed and dismissed.

1. Illegitimate Children —33

The mother as the party responsible for the illegitimate child should have the entire two-year limitation period during which to consider a choice which will bind the child, but once she makes that choice such as by a release or waiver of claims against the alleged father, the choice should also bind the child; overruling *Reynolds v. Richardson*, 463 S.W.2d 747. T.C.A. § 36-224(1).

2. Constitutional Law —349(3)

In determining whether application of limitations statute in paternity action denies equal protection, the right to paternal support throughout minority, a right which exists equally in favor of both legitimates and illegitimates, must be distinguished from the right to establish the identity of the individual who bears the duty of support, a right as to which legitimates and illegitimates are not similarly situated. T.C.A. § 36-224(1); U.S.C.A. Const. Amend. 14.

3. Illegitimate Children —31

Statute requiring that a paternity action be instituted not more than two years from the birth of the child unless paternity has been acknowledged by the father in writing or by the furnishing of support is not unconstitutional as denying substantial benefit to children born out of wedlock because children born in wedlock may sue

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

September 7, 1982

1 STATE OF TENNESSEE)

2 Appellee)

3 V.)

4 HUGH W. MELSON,)

5 Appellant)


MADISON CRIMINAL No. 3

SEP 15 1982

8
9 ORDER ON PETITION TO REHEAR

10
11 The Appellant, Hugh W. Melson, has filed a Petition
12 to Rehear in the above captioned case. He has also filed a
13 Motion for Stay of Execution pending the disposition of the
14 Petition for Rehearing.

15
16 After careful consideration, the Court is of the opinion
17 that the Petition to Rehear is not well taken and the same is
18 denied at the cost of Appellant. The Motion for Stay of
19 Execution is accordingly denied.

20
21 
22 Frank F. Drowota, III, Justice.

23 Concur:
24 Harbison, C.J.
25 Fones, Cooper and Brock, JJ.

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27
28
29
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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. CONSTITUTION OF THE UNITED STATES, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. CONSTITUTION OF THE UNITED STATES, AMENDMENT VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

3. CONSTITUTION OF THE UNITED STATES, AMENDMENT VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

5. TENNESSEE CODE ANNOTATED, Section 39-2404 and Section 39-2406:

Due to the length of this statute, it is attached hereto in the Appendix as "A-4" and "A-5".

39-2404. Punishment for murder in first degree — Sentencing proceeding — New trial. — (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below, and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/ _____

Jury Foreman

/s/ _____

Juror

/s/ _____

Juror

/s/ _____

Juror

/s/ _____

Juror

/s/ _____

Juror

/s/ _____

Juror

/s/ _____

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/s/ _____
Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall (1) reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found and (2) signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

(Here list the statutory aggravating circumstance or circumstances so found)

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/ _____
Jury Foreman

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

/s/ _____
Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve years of age and the defendant was eighteen years of age, or older.

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person.

(3) The defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder.

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration.

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another.

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties.

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office.

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official.

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime;

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, § 4600 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6441; Code 1932, § 10770; Acts 1977, ch. 81, § 2; 1981, ch. 33, § 1.]

39-2406. Death sentence — Appeal — Automatic review by Supreme Court — Automatic life sentence when death sentence precluded. — (a) Whenever the death penalty is imposed for murder in the first degree and upon the judgment becoming final in the trial court, the defendant shall have the right of direct appeal from the trial court to the Tennessee Supreme Court, which shall have exclusive appellate jurisdiction, provided that the sentence of death shall be automatically reviewed by the Tennessee Supreme Court and said sentence review shall be consolidated for consideration with the direct appeal, if prayed for. If the defendant has been convicted of first degree murder and sentenced to death and appeals that conviction and sentence, the record as to guilt and sentence shall be expeditiously filed with the Tennessee Supreme Court within the time limit provisions of §§ 27-1-111 and 27-3-121. If the defendant has been convicted of first degree murder and sentenced to death but does not appeal the conviction of first degree murder, then the trial judge shall certify, within ninety days after the judgment has become final, the record relating to punishment and the same shall be transmitted by the clerk of the trial court to the Tennessee Supreme Court. If the defendant has been convicted of other crimes at the same trial wherein a death sentence is imposed, the Tennessee Supreme Court shall have authority to review by direct appeal such other crimes if appealed by the defendant with the conviction of first degree murder and sentence of death.

(b) The appeal of the conviction of first degree murder and the review of the sentence of death shall have priority over all other cases and shall be heard according to rules promulgated by the Tennessee Supreme Court. The Tennessee Supreme Court shall first consider any errors assigned and then the court shall review the sentence of death.

(c) In reviewing the sentence of death for murder in the first degree, the Tennessee Supreme Court shall determine whether (1) the sentence of death was imposed in any arbitrary fashion; (2) the evidence supports the jury's findings of a statutory aggravating circumstance or statutory aggravating circumstances; (3) the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance or circumstances so found; and (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable it to properly review the death sentence.

(d) In addition to its other authority regarding correction of errors, the Tennessee Supreme Court, in reviewing the death sentence for murder in the first degree, is authorized to (1) affirm the sentence of death; or (2) modify the punishment to life imprisonment.

(e) In the event that any provision of §§ 39-2402, 39-2404, 39-2405, 39-2407 or this section or the application thereof to any individual or circumstance is held to be invalid or unconstitutional by the Tennessee Supreme Court or a federal court, so as permanently to preclude a sentence of death as to that individual, the court having jurisdiction over such individual previously sentenced to death shall cause such individual to be brought before the proper court which shall sentence such person to imprisonment for life. [Acts 1919, ch. 5, § 1; Shan. Supp., § 6442a1; Code 1932, § 10772; Acts 1973, ch. 192, § 2; 1974 (Adj. S.), ch. 462, § 3; 1977, ch. 51, §§ 4, 6.]

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

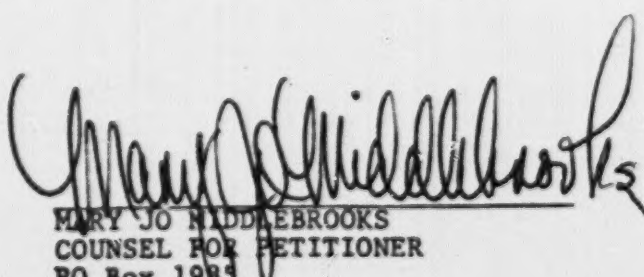
HUGH W. MELSON, Petitioner

vs

STATE OF TENNESSEE

CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of November, 1982, two copies of the Petition for Writ of Certiorari, the Motion for Leave to Proceed in Forma Pauperis, and the Supporting Affidavit were mailed, first class, postage prepaid, to the Honorable Gordon W. Smith, Assistant Attorney General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 38219. I further certify that all parties required to be served have been served.


MARY JO MIDDLEBROOKS
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

Office - Supreme Court, U.S.
FILED
DEC 8 1982
ALEXANDER L. STEVENS
CLERK

NO. 82-5698

HUGH W. MELSON,
PETITIONER,

V.

STATE OF TENNESSEE,
RESPONDENT.

ON PETITION FOR THE WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence presented at trial was sufficient to convict the petitioner of murder in the first degree beyond a reasonable doubt as required by the due process clause of the Fourteenth Amendment.
2. Whether the petitioner's Eighth Amendment rights were violated by the fixing of excessive bail.
3. Whether the petitioner's rights to a fair and impartial trial as guaranteed by the Sixth Amendment to the United States Constitution, and to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution were violated by the failure to grant him a change of venue.
4. Whether the petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth Amendment right to due process were violated by admission of certain photographs of the crime scene.
5. Whether the petitioner's Sixth Amendment right to a fair and impartial trial and his Fourteenth right to due process were violated by admission of various types of testing.
6. Whether the petitioner's right to an impartial jury under the Sixth, Eight and Fourteenth Amendments to the United States Constitution was violated by imposition of a "death qualified" jury and by excusal for cause of all who opposed the death penalty.
7. Whether the petitioner's Sixth Amendment right to effective assistance of counsel and his Fourteenth Amendment right to due process were violated by the refusal of the trial court to grant a continuance of the trial.

8. Whether the petitioner's Fourth Amendment right was violated by the admission of evidence seized as a result of an alleged illegal arrest.

9. Whether the petitioner's Fourth Amendment right was violated by the admission of evidence seized as a result of an alleged illegal search.

10. Whether the Tennessee Death Penalty Act is unconstitutional because it violates the Eight and Fourteenth Amendments to the Constitution of the United States.

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OPINION BELOW

The opinion of the Supreme Court of Tennessee is reported at 638 S.W.2d 342.

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257. Respondent submits that this record does not present a substantial federal question. The judgment of the Supreme Court of Tennessee was entered on August 16, 1982. Petitioner's petition to rehear was denied on September 7, 1982. The petitioner timely filed his Petition for Writ of Certiorari with this Court.

STATEMENT OF THE CASE

On May 6, 1980, the Madison County, Tennessee Grand Jury returned an indictment charging the petitioner, Hugh W. Nelson, with murder in the first degree. On October 14, 1980, jury selection began and continued until completion on October 15, 1980. Following the petitioner's plea of not guilty, the trial commenced in the Circuit Court of Madison County on October 17, 1980. On October 17, 1980, the jury found the petitioner guilty of murder in the first degree. That same day, after a bifurcated sentencing hearing, the jury sentenced the petitioner to death by electrocution. The jury found unanimously the following statutory aggravating circumstances: (1) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind, and (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. The jury unanimously found no mitigating circum-

stances sufficiently substantial to outweigh the statutory aggravating circumstances listed above. The trial court approved the verdict and sentence by overruling petitioner's motion for a new trial on December 5, 1980.

Petitioner appealed to the Supreme Court of Tennessee, which affirmed the judgment on August 16, 1982. A petition to rehear was denied on September 7, 1982.

REASONS FOR DENYING THE WRIT

Respondent submits that the Supreme Court of Tennessee correctly affirmed the trial court's judgment approving the jury verdict finding the petitioner guilty of murder in the first degree and fixing his punishment at death by electrocution. The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by the Court or decide such question in a way not in accord with the applicable decisions of this Court; not did the Supreme Court of Tennessee decide a federal question in a way in conflict with another state court of last resort or of a federal court of appeals. See Supreme Court Rule 17.1. There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

ARGUMENT

I.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S
CONTENTION THAT THE EVIDENCE AT TRIAL WAS LEGALLY
INSUFFICIENT TO SUSTAIN HIS CONVICTION.

The petitioner contends that the evidence at trial was insufficient to sustain the jury's verdict of guilty for first degree murder. In examining this complaint, the Supreme

Court of Tennessee found that the evidence was sufficient to sustain the jury's verdict beyond a reasonable doubt under the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979). State v. Melson, 638 S.W.2d 347-350 (Tenn. 1982). Since the evidence included proof that the victim and the petitioner had an argument over the petitioner's theft of gasoline, that a ball peen hammer found in the petitioner's truck could have been the murder weapon, that hair found on the hammer and embedded in a substance suspected to be blood matched the victim's hair, that hair found on the victim's blouse matched the petitioner's hair, and that spattered bloodstain patterns on the petitioner's clothing could have resulted from a head being repeatedly struck with a blunt instrument, the Supreme Court's conclusion was warranted by the record and, therefore, the allegation does not warrant the granting of certiorari.

II.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S
CONTENTION THAT HIS EIGHTH AMENDMENT RIGHTS WERE
VIOLATED BY EXCESSIVE BAIL.

The petitioner contends that his Eighth Amendment rights were violated by the fixing of excessive bail. The Supreme Court of Tennessee found that the matter of bail was discretionary with the trial court, that the record failed to show that the trial court's purpose in setting bail in the amount of \$200,000 was to prevent the petitioner from gaining his freedom rather than to assure his presence in court, and that even if the amount fixed was excessive, the record does not show that the outcome of the case was more probably than not affected. 638 S.W.2d at 358. Since the record contains no transcripts of the bond hearings, nor any other evidence to support the petitioner's contention, the respondent submits that the conclusion of the Supreme Court of Tennessee was war-

ranted and, therefore, the allegation does not merit the granting of certiorari.

III.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S
COMPLAINT THAT THE TRIAL COURT ERRED IN
DENYING HIS MOTION FOR A CHANGE OF VENUE.

The petitioner contends that due to the nature and extent of the pre-trial publicity in this case, he was deprived of his right to a fair trial by the trial court's refusal to grant a change of venue. In examining this complaint, the Supreme Court of Tennessee found that although there was pre-trial publicity at the time of the crime, the publicity died down prior to trial, that all of the media reportage was factual in nature except one editorial, and that none of the news articles was sensational or otherwise improper. 638 S.W.2d at 359-360. The Court concluded that the trial court did not abuse its discretion in denying the motion for a change of venue. 638 S.W.2d at 361-362. The respondent submits that this conclusion is warranted by the record and, therefore, the allegation does not merit the granting of certiorari. As stated by this Court in Dobbert v. Florida, 432 U.S. 282 (1977), the petitioner "has simply shown that the community was made well aware of the charges against him and asks [the court] on that basis to presume unfairness of constitutional magnitude at his trial." 432 U.S. at 303

IV.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED THE
PETITIONER'S COMPLAINT THAT THE TRIAL COURT
ERRED IN ADMITTING CERTAIN PHOTOGRAPHS OF
THE CRIME SCENE.

The petitioner contends that his right to a fair trial

was denied by the admission of certain photographs of the crime scene. The Supreme Court of Tennessee concluded that these photographs were relevant and admissible to show the elements of premeditation and deliberation, to show the basis of the investigating officers' conclusory opinion, objected to by the defense on cross-examination, that the room was covered with blood, and to aid the jury in evaluating the testimony of the blood spatter expert who based part of his analysis upon the photographs. 638 S.W.2d at 364-365. The respondent submits that this conclusion is supported by the record and, therefore, the allegation does not merit the granting of certiorari.

V.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED THE
PETITIONER'S COMPLAINT THAT HIS RIGHT
TO A FAIR TRIAL WAS DENIED BY THE
ADMISSION OF VARIOUS TESTS.

The petitioner contends that he was denied a fair trial by the admission of testimony by a blood spatter expert who analyzed the blood spatters on the petitioner's clothing and at the crime scene, and the admission of the testimony of two FBI Special Agents concerning the analysis of the petitioner's clothing for blood and comparison of hair samples taken from the petitioner and the victim. In examining this complaint, the Supreme Court of Tennessee concluded that the blood spatter expert was properly qualified and his testimony admissible, 638 S.W.2d at 363-364; and that the testimony of the FBI agents was clearly admissible. 638 S.W.2d at 365-366; United States v. Brady, 595 F.2d 359 (6th Cir. 1979). The respondent submits that this conclusion is warranted by the record and, therefore, the allegation does not merit the granting of certiorari.

VI.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED THE
PETITIONER'S COMPLAINT THAT THE TRIAL COURT
ERRED IN EXCUSING FOR CAUSE CERTAIN JURORS
WHO COULD NOT FOLLOW THE LAW AND IMPOSE
THE DEATH PENALTY.

In reliance upon Witherspoon v. Illinois, 391 U.S. 510 (1968), the petitioner contends that the trial court erred in improperly disqualifying prospective jurors who could not consider the imposition of the death penalty in this case. The Supreme Court of Tennessee found the complaint to be without merit. 638 S.W.2d at 362. The record shows that all of the jurors in question testified that they could not follow the law in considering the range of punishment, that they would not consider the death penalty, and that they would automatically vote against the imposition of a sentence of death. Since the action of the trial court was proper under Witherspoon, supra, the allegation does not merit the granting of certiorari.

VII.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S
COMPLAINT THAT HE WAS DENIED A FAIR TRIAL BY
THE REFUSAL OF THE TRIAL COURT TO GRANT
A CONTINUANCE.

The petitioner contends that he was denied a fair trial by the refusal of the trial judge to grant him a continuance of his trial. In reviewing this complaint, the Supreme Court of Tennessee found that the record did not show that the trial court abused his discretion in denying the continuance. 638 S.W.2d at 359. Since the record does not contain a transcript of any hearing on this matter and there is no evidence that the petitioner was prejudiced by the denial, the Supreme Court's conclusion was warranted and, therefore, the allegation does not merit the granting of certiorari.

VIII.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S
CONTENTION THAT HIS ARREST WAS ILLEGAL AND THAT
EVIDENCE SEIZED AS A RESULT OF THAT ARREST
SHOULD HAVE BEEN SUPPRESSED.

The petitioner contends that his warrantless arrest was without probable cause and that, therefore, the evidence taken from him incident to the arrest - - his cap, shirt, trousers, and boots - - was inadmissible at trial. In examining this complaint, the Supreme Court of Tennessee concluded that the trial court correctly held that probable cause existed at the time of the petitioner's arrest. 638 S.W.2d at 350-351. The record supports that conclusion. Officers investigating the homicide testified that they arrived at the murder scene, determined that the victim was dead, and observed the appearance of the scene. They then conversed with the victim's daughter-in-law, who related that she had talked with the victim earlier that day, that the victim stated that she had caught the petitioner stealing gasoline, that the victim had confronted the petitioner, that an argument ensued, and that the petitioner had become very upset. The victim told the defendant she would have to tell her husband about the theft of the gasoline. Although the victim did not positively state that the petitioner had threatened her, she told her daughter-in-law that she was afraid to leave the house. As a result of this report, the officers proceeded to the home of a retired farm hand, where they found the petitioner. The petitioner was taken into custody and transported by car to the murder scene. Upon arriving there, the officers noticed what looked like spots of blood on the petitioner's clothing and formally arrested him, advising him of his rights. All of this activity took place within an hour of the discovery of the victim's body.

In Beck v. Ohio, 379 U.S. 89 (1964), this Court stated:

Whether that arrest was constitutionally valid depends in turn upon whether at the moment the arrest was made, the officers had probable cause to make it - - whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.

379 U.S. at 91. In the instant case, probable cause existed at the time the officers took the petitioner into custody on the basis of what the victim's daughter-in-law had related. Certainly probable cause existed after they observed what was apparently blood on his clothing in view of the quantity of blood shed at the murder scene. The respondent submits that the petitioner's allegation does not merit the granting of certiorari.

IX.

THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S COMPLAINT THAT THE SEARCH OF HIS TRUCK WAS ILLEGAL AND THAT THE EVIDENCE SEIZED SHOULD HAVE BEEN SUPPRESSED.

The petitioner contends that the search warrant authorizing the search of his truck was invalid and, therefore, the items seized therein should have been suppressed at trial. In reviewing the petitioner's complaint, the Supreme Court of Tennessee found that the search warrant was valid. 638 S.W.2d at 352-358. The record supports that finding.

A. The record does not show that reckless misrepresentations were made in the search warrant affidavit.

The record in the instant case does not preponderate against the trial court's finding that there had been no false statements either intentionally or recklessly made by the affiant. See 638 S.W.2d at 352.

B. The search warrant affidavit was not defective for failure to set forth material facts establishing the credibility of citizen informants.

The petitioner argues that there is nothing in the affidavit to show that the above-listed sources of information were credible or that the information was reliable. The respondent submits that the affidavit which referred to information supplied by citizen-informants need not set forth material establishing the credibility of the citizen-informants. United States v. Bell, 457 F.2d 1231 (5th Cir. 1972); United States v. Rollins, 522 F.2d 160 (2d Cir. 1975), cert. denied, 411 U.S. 920 (1973); United States v. McCoy, 478 F.2d 176 (10th Cir.), cert. denied, 414 U.S. 828 (1973). The name of the "reliable source" was not required to be disclosed in the affidavit. United States v. Harris, 403 U.S. 573 (1971).

C. The search warrant did not authorize a general, exploratory search.

The warrant authorizes the seizure of "a blunt object, knife, or object capable of being used to strike, stab, cut, penetrate, and other paraphernalia pertaining to this incident." This description did not authorize a general, exploratory search, but sufficiently limited the authority to search while giving the officers needed discretion. See Anderson v. Maryland, 427 U.S. 463 (1976).

D. The search and seizure did not exceed the authority of the warrant.

The petitioner contends that the affidavit requests authority to search any box or container in the truck, but the warrant does not specifically include such box or container. It authorizes the search of "the truck." The respondent submits, however, that the outside of the warrant - - that which would show when the warrant was folded and served - - specifies "1974

Green Ford Pickup Truck", "License No. 7J 469A and any containers and boxes found therein." As the Supreme Court of Tennessee found, the conclusion is inescapable that the omission of "boxes and containers" from the warrant was merely inadvertent. The warrant was meant to authorize the search of the truck's contents.

The respondent submits that the petitioner's allegations concerning the validity of the search warrant do not merit the granting of certiorari.

X.

THE SUPREME COURT OF TENNESSEE FULLY
CONSIDERED AND CORRECTLY REJECTED PETITIONER'S
CONTENTION THAT THE TENNESSEE DEATH PENALTY STATUTES
ARE UNCONSTITUTIONAL.

A. Tenn. Code Ann. § 39-2404(i)(5) and (6) are not constitutionally vague or overbroad.

The petitioner contends that Tenn. Code Ann. § 39-2404 (i)(5), an aggravating circumstance which provides "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind", and Tenn. Code Ann. § 39-2404 (i)(6), an aggravating circumstance which provides "the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another", are vague and unconstitutional as written. With respect to § 39-2404(i)(5), the same allegation was raised in Proffitt v. Florida, 428 U.S. 242, 255-256 (1976), in which this Court held that an identical aggravating circumstance under the Florida statute was not impermissibly vague as it has been construed by the Florida Supreme Court. See Gregg v. Georgia, 420 U.S. 153, 200-203 (1976). See also Spinkellink v. Wainwright, 578 F.2d 582, 610-612 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). The Tennessee Supreme Court has construed the Tennessee statute constitutionally. State v. Pritchett, 621

With respect to Tenn. Code Ann. § 39-2404(i)(6), the issue presented here was not raised in the state trial or Supreme Court and is now presented for the first time. In any event, the words of § 39-2404(i)(6) are sufficiently precise to put an individual on notice of the proscribed conduct. See United States v. Harris, 347 U.S. 612 (1954). Nor is the statute vague or overbroad as applied to the petitioner under the facts which show that the victim threatened to expose his alleged theft of gasoline and that the petitioner made statements concerning his being in trouble over the theft.

B. The petitioner's sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, nor is the review procedure in Tennessee constitutionally inadequate.

The petitioner contends that his sentence of death is disproportionate to the penalty imposed in similar cases and that the proportionality review procedure in Tennessee is constitutionally inadequate. The respondent submits that comparing petitioner's case with numerous others illustrates that imposition of the death penalty in this case does not demonstrate that the jury was aberrant, arbitrary or capricious. See State v. Berry, 592 S.W.2d 553 (Tenn. 1980), rev'd on other grounds (brutal beating with ball peen hammer), and State v. Austin, 618 S.W.2d 738 (Tenn. 1981) (killing to eliminate a witness to illegal activity). Nor is the sentencing review process established under Tenn. Code Ann. § 39-2406 and Rule 12, Rules of the Supreme Court of Tennessee, unconstitutionally inadequate to afford a meaningful proportionality review. The Tennessee Supreme Court has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences and, by following this procedure, the Court has in effect adopted the type of proportion-

ality review constitutionally mandated. See Proffitt v. Florida, 428 U.S. 242, 258-259. See also State v. Pritchett, 621 S.W.2d 127 (Tenn. 1981); State v. Strouth 620 S.W.2d 467 (Tenn. 1981); State v. Coleman, 619 S.W.2d 112 (Tenn. 1981); State v. Groseclose, 615 S.W.2d 142 (Tenn. 1981).

C. Tenn. Code Ann. § 39-2404(h) is not unconstitutional.

The petitioner contends that Tenn. Code Ann. § 39-2404(h), which prohibits the sentencing jury from being informed that their failure to agree unanimously on punishment requires the trial court to impose a life sentence, is unconstitutional. This Court has previously found that this issue does not warrant the granting of certiorari and the same finding should be made in the instant case. Houston v. Tennessee, 449 U.S. 891 (1980).

D. Tenn. Code Ann. § 39-2404(j) is not unconstitutional.

The petitioner contends that Tenn. Code Ann. § 39-2404(j) is unconstitutional in failing to require the jury to specify what mitigating circumstances have been considered and found to be absent and insufficient to outweigh the aggravating circumstances, thus precluding review. The respondent submits that so long as the record reveals the evidentiary basis for the imposition of the death penalty so as to insure that the appellate court may conduct a review of the proceedings and insure that the penalty was not imposed arbitrarily or capriciously, the concerns of Furman v. Georgia, 408 U.S. 238 (1972), are met. Gardner v. Florida, 430 U.S. 349 (1977). Thus, written findings of mitigating circumstances are not required. See Andrews v. Morris, 607 P.2d 816, 823 (Utah 1980), cert. denied, 449 U.S. 891. The record in this case discloses all of the evidence offered in mitigation.

E. Tenn. Code Ann. § 39-2404(f) and (g) is not unconstitutional.

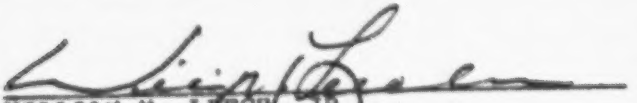
The petitioner contends that Tenn. Code Ann. § 39-2404(f) and (g) unconstitutionally fails to specify the burden of proof and standard of proof to be used in determining whether aggravating circumstances outweigh mitigating circumstances. This Court has previously found that this issue does not warrant the granting of certiorari and the same finding should be made in the instant case. Houston v. Tennessee, 449 U.S. 891 (1980).

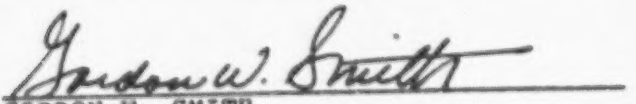
The respondent submits that the petitioner's constitutional challenges do not merit the granting of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,


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